

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JEFFREY M. MASSON, Petitioner V.

NEW YORKER MAGAZINE, INC., ALFRED A.

KNOFF, INC. AND JANET MALCOLM

CASE NO: 89-1799

PLACE: Washington, D.C.

DATE: January 14, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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JEFFREY M. MASSON, :
Petitioner :
v. : No. 89-1799
NEW YORKER MAGAZINE, INC., :
ALFRED A. KNOPF, INC. AND :
JANET MALCOLM :
----- X

Washington, D.C.
Monday, January 14, 1991

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
2:00 p.m.

APPEARANCES:

CHARLES O.MORGAN, JR., ESQ., San Francisco, California; on
behalf of the Petitioner.
H. BARTOW FARR, III, ESQ., Washington, D.C.; on behalf of
the Respondents.

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P R O C E E D I N G S

(2:00 p.m.)

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2
3 CHIEF JUSTICE REHNQUIST: We'll hear next in No.
4 89-1799, Jeffrey M. Masson against New Yorker Magazine,
5 Alfred Knopf, and Janet Malcolm.

6 ORAL ARGUMENT OF CHARLES O. MORGAN, JR.

7 ON BEHALF OF THE PETITIONER

8 MR. MORGAN: Mr. Chief Justice, if it please the
9 Court:

10 This is an action by Jeffrey Masson in which he
11 has claimed he has been defamed by publishing of
12 defamatory quotations purportedly said by him, but never
13 said by him. Both the district court and the court of
14 appeal assumed that the fact that the quotations were
15 fabricated. I am assuming that this Court will accept the
16 same assumption, however, I am prepared to discuss the
17 various factors that we introduced in addition to the fact
18 that the words were not on the tape.

19 The Ninth Circuit, in making its decision,
20 stated, one, that a fabricated quote that is wholly
21 fabricated creates an inference of actual malice. But it
22 went on to say then that fictionalized quotes will not
23 create an inference of malice if the fictionalized quote
24 is a rational interpretation of what the speaker said, or
25 if it does not alter the substantive content of what the

1 speaker said.

2 Then they went a step further and they said, as
3 an example of the latter, that a fictionalized quote
4 created no inference of malice because it was consistent
5 with the speaker's lifestyle and his idea of fun. It went
6 further and said that it came within the same concept and
7 did not create an inference of actual malice if it was
8 substantially the same as his own self-appraisal of
9 himself.

10 QUESTION: Well, Mr. Morgan, do you take the
11 position that every misquote gives rise to an inference of
12 actual malice?

13 MR. MORGAN: I take the position that every
14 misquote that is defamatory and is not just a very minor
15 misquote --

16 QUESTION: Well, what is defamatory is typically
17 defined under State law, right?

18 MR. MORGAN: That's correct, Your Honor.

19 QUESTION: Not Federal law.

20 MR. MORGAN: That's correct, Your Honor.

21 QUESTION: So we're not concerned with that
22 here.

23 MR. MORGAN: That's correct, Your Honor. So
24 what we deal with here -- and California is interesting,
25 because in California if a statement exposes a person --

1 that's all it is, it doesn't have to say that he does it
2 or he is it, or whatever, it merely says if it exposes him
3 to contempt, ridicule, obloquy, or if it has a tendency to
4 harm him in his profession. And so therefore any
5 statement of that form that is not what the speaker said,
6 in our opinion creates an inference of actual malice.

7 And I'm not basing that on whole cloth. We are
8 basing that on this Court's statement in St. Amant v.
9 Thompson when this Court said that professions of good
10 faith will be unlikely to prove persuasive, for example,
11 where a story is fabricated by the defendant or is the
12 product of his imagination.

13 QUESTION: Do you think the injury to reputation
14 is different when the injury occurs by virtue of a
15 misquote than when it occurs by virtue of a
16 characterization?

17 MR. MORGAN: Absolutely, Your Honor. And I
18 think that all of the amici briefs and their documents
19 they put in point out to you that the impact when it's
20 coming from the individual, as opposed to coming from the
21 writer's perception of the individual, has a greater
22 impact.

23 QUESTION: I suppose the law has always
24 recognized that when it admits an admission by a party but
25 excludes hearsay. I suppose it's almost the same

1 principle.

2 MR. MORGAN: That's correct, Your Honor. And so
3 obviously it has a far greater impact.

4 QUESTION: Mr. Morgan, what if -- what if I'm in
5 an interview with someone and I make some statements that
6 are very racist. I say that I think a particular ethnic
7 group is little more intelligent than dogs, that they
8 really can't cope in our society, something like that.
9 And the next day there appears in the paper the quote,
10 Scalia says this group is subhuman.

11 MR. MORGAN: Yes.

12 QUESTION: Now, that's an inaccurate quote.

13 MR. MORGAN: That's right.

14 QUESTION: Is there liability for that? I mean,
15 if they had, if they had quoted it accurately it would
16 have been just as defamatory.

17 MR. MORGAN: Well, not necessarily, Your Honor.
18 We start with this. The person that made that statement,
19 of course, he also has the right of the freedom of speech
20 and the public has the right to hear exactly what he said.
21 Now, what you are doing is you are substituting your
22 conclusion for what he said, and yet the very words may
23 not necessarily be the same.

24 QUESTION: Well, that's right. But I'm not
25 going to the question of malice. I'm accepting your

1 position that all you need for malice is intentionally
2 altering a quote. I intentionally -- this is
3 intentionally altered. There is no doubt I didn't say
4 that and the writer knows I didn't say that. But having
5 overcome the question of malice, you still have the
6 question of what's defamatory. And it's your position
7 that that is an actual -- an actionable defamation even
8 though an accurate quote would have harmed my reputation
9 just as much?

10 MR. MORGAN: If I devine what I think you're
11 saying, and what I think you're posing, you're really
12 dealing with the concept of incremental harm.

13 QUESTION: Yes.

14 MR. MORGAN: Because you use the term
15 defamatory. The minute you say something that will
16 subject me or expose me to obloquy --

17 QUESTION: Right.

18 MR. MORGAN: -- it's defamatory. But now the
19 next question is am I harmed by it? Am I damaged by it
20 because I said something that at least in your perception
21 is similar to what they are writing? If I understand the
22 concept, and my own feeling is that there isn't such a
23 concept as incremental harm and we really haven't seen it
24 anywhere yet, nevertheless I am still entitled to have a
25 trier of fact decide whether this particular one, this

1 statement, is any different than this statement. As long
2 as I have met all the rest of the requirements, then it
3 seems that the trier of fact makes the decision well,
4 there's no harm because he said exactly the same thing.
5 That's not this case though, Your Honor, and I think
6 that's important to point out.

7 QUESTION: Mr. Morgan, in any event, wouldn't
8 any issue of incremental harm be a matter of State
9 defamation law --

10 MR. MORGAN: I believe so.

11 QUESTION: -- rather than of First Amendment
12 law?

13 MR. MORGAN: Absolutely. I don't think it's an
14 issue here. I don't think that the Ninth Circuit was
15 right in even raising it in this case.

16 QUESTION: Could I change Justice Scalia's
17 hypothetical just a little? Supposing it's perfectly
18 clear that the actual quote is much more insulting and
19 harmful and defamatory, but yet the -- what is actually
20 said is also defamatory. Have you proved malice just by
21 that, by the fact it's inaccurate?

22 MR. MORGAN: Have I proved malice? Yes, because
23 -- and I know we're talking about the Hotchner case, and I
24 think it's a mistake to equate that case here. But have I
25 proved malice? Yes. I have proved you fabricated a

1 quote. I proved it was defamatory. Now the only question
2 is am I entitled to any damages. Who knows? Maybe I'm
3 only entitled to \$1 damages, but maybe I'm entitled to X
4 dollars punitive damages because of the manner in which
5 the writer brought about this situation. Who knows on
6 that? At least that's for the trier of fact to decide.

7 QUESTION: Well, whether what -- whether these
8 quotes, whether they were fabricated or not and defamatory
9 isn't involved in this case, is it? Isn't it -- doesn't
10 this case turn on malice?

11 MR. MORGAN: Well, but malice requires
12 defamation, Your Honor. I mean, in other words --

13 QUESTION: I think a lot of people can defame
14 people and not be liable because they didn't do it
15 maliciously.

16 MR. MORGAN: Well, but maliciously is the wrong
17 word, and I say this most respectfully to this Court, from
18 a man who has tried a number of --

19 QUESTION: What is the issue here? Is it
20 whether these -- this is defamatory? Are we supposed to
21 decide whether what was said was defamatory?

22 MR. MORGAN: No, Your Honor. The issue is did
23 we prove enough in the district court that the articles
24 were written either knowing they were false or with a
25 reckless disregard of the truth or falsity.

1 QUESTION: Whether malice was involved. That's
2 what the case turns on.

3 MR. MORGAN: That's correct, Your Honor.

4 QUESTION: Well, that's what I asked you and you
5 said no.

6 MR. MORGAN: Well then I misunderstood you, and
7 my apologies, Your Honor.

8 QUESTION: Well, you don't like the term malice
9 because for many people it excludes reckless disregard.
10 So you like to talk about reckless disregard.

11 MR. MORGAN: Your Honor, all I can tell you, and
12 I have seen it occasionally from the courts, say that it
13 was a poor choice of words, and I say this most
14 respectfully, it's an abomination. Because I've had
15 situations --

16 QUESTION: But it's our words.

17 (Laughter.)

18 MR. MORGAN: But it's a bad word, and it's time
19 to change it. Because I've had jurors say to me
20 afterwards, well, I didn't see any malice --

21 QUESTION: Well, in any event we're probably
22 getting off the point. I'm not sure what interest is
23 protected by saying that there is reckless disregard for
24 the truth by altering the quotation in a way that makes it
25 no more defamatory than, or perhaps even less in Justice

1 Stevens' hypothetical, than the original statement. What
2 are we protecting there? Why --

3 MR. MORGAN: Well, two things. First, you know,
4 the concern I have here is these words weren't as
5 defamatory or the -- as what he said. They're not
6 equivalent. And I'll take a moment to show you one. But
7 the answer is what interests are we protecting? We're
8 protecting the right of the speaker.

9 And as you have said before, and it's Virginia
10 Power or something like that that we have quoted in our
11 brief, that the First Amendment protects the
12 communication, the speaker, and the public. And certainly
13 when we're dealing with quotations, and we're now talking
14 about public figures and public officials, that certainly
15 he has a right under the First Amendment to expect that he
16 will not have a fabricated defamatory quote. And that's
17 our position.

18 QUESTION: Well, I'm not sure that's a good way
19 to put it, to say he has a right under the First
20 Amendment. The First Amendment applies to the Government.
21 A politician as opposed -- relating to the New Yorker,
22 you're talking about the liability there is based on State
23 libel law.

24 MR. MORGAN: Except that we are confronted with
25 the First Amendment --

1 QUESTION: The First Amendment used as a shield.

2 MR. MORGAN: That's right, because he's a public
3 figure. And so therefore, as at least he is labeled as a
4 public figure, and so therefore he has a right under the
5 First Amendment to be quoted as he spoke.

6 QUESTION: No. He has no right as against the
7 New Yorker magazine under the First Amendment. What you
8 mean to say, I think, is that the First Amendment should
9 not prohibit State libel law from giving him that right.

10 MR. MORGAN: I will accept that, Your Honor.

11 (Laughter.)

12 MR. MORGAN: Let me now --

13 QUESTION: Under your rule, aren't you going to
14 create serious disincentives to use direct quotes or even
15 to have a tape recorder?

16 MR. MORGAN: No. No, Your Honor. Direct quotes
17 have been going on as long as we know they've been going
18 on, and if you read all the material, they all tell you
19 exactly the same thing. Quote what was said exactly, and
20 if you can't, then don't quote that, paraphrase it. Quote
21 the part that you are satisfied with.

22 Now please keep in mind, Your Honor, we're not
23 talking about the mistake. We're not talking about the
24 poor reporter who has to get a quote in a hurry and then
25 is putting it into the hot news. We're talking about a

1 situation where --

2 QUESTION: Well, but you are, because you're
3 arguing that every misquote gives rise to an inference of
4 actual malice. And so the reporter who's in a hurry, or
5 whose tape gets garbled and who relies on memory is then
6 at risk if the person quoted says that isn't exactly what
7 I said.

8 MR. MORGAN: At risk, but not liable. Certainly
9 anytime anybody writes -- because again we have still got
10 the reputation to consider. This is the other side of
11 this tension. And every time a reporter writes something
12 that is defamatory, certainly there has got to be some at
13 risk so that the reputation is protected.

14 QUESTION: Excuse me, you wouldn't get by a
15 motion for summary judgment unless, I take it, there was
16 clear and convincing evidence that there was an
17 intentional misquote.

18 MR. MORGAN: That's right.

19 QUESTION: Not just clear and convincing
20 evidence of a misquote, but clear and convincing evidence
21 that the misquote was intentional. You're not --

22 MR. MORGAN: Absolutely, Your Honor. If the
23 reporter said look, I did it in a hurry, I thought what I
24 had was right, and I have no other evidence, I lose. And
25 the chances are I won't bring the lawsuit.

1 Now, what I would like to talk about is a couple
2 of the quotes so I can dispel any concept that they are
3 the same. And I want to start first with intellectual
4 gigolo. And I think it's important to understand now,
5 these -- what the writer did was take two different
6 conversations, and if you look in the appendix you will
7 see that one conversation is tape 7, and one conversation
8 is tape 12.

9 In tape 7 he talks about his affair with a
10 graduate student, and what he says is that you're great --
11 she tells him you're great in the bedroom, but you're a
12 total embarrassment outside. Now that doesn't fit any
13 definition of intellectual gigolo, nor of any gigolo. All
14 it shows is a young college kid who is a total
15 embarrassment outside of his bedroom. Then sometime later
16 there's another conversation in which Mr. Masson is
17 talking about trying to get patients as a psychoanalyst,
18 and he is complaining that, well, nobody will help him.
19 Nobody will get patients for him. And he says I was a
20 private asset and a public liability because in their room
21 they enjoyed talking to me, but because I was so junior
22 they would have nothing to do with me outside the room.
23 That's not a gigolo, and it's not an intellectual gigolo.

24 QUESTION: He didn't -- he didn't say -- he was
25 not quoted to say "I am an intellectual gigolo." If he

1 was quoted to say "I am an intellectual gigolo," I can
2 understand how that is defamatory. He was quoted as
3 saying they treated me like an intellectual gigolo. How
4 --

5 MR. MORGAN: But it was his words, Your Honor.

6 QUESTION: But how is that defamatory? I guess
7 you argue that defamation is not an issue here?

8 MR. MORGAN: No --

9 QUESTION: Can I think it's not defamatory and
10 still find for you in this case? Because I don't think
11 it's defamatory.

12 MR. MORGAN: Of course not, of course not. No.

13 QUESTION: I can't?

14 MR. MORGAN: It has to be defamatory.

15 QUESTION: Oh.

16 MR. MORGAN: Otherwise there is no basis for a
17 lawsuit. But the point is --

18 QUESTION: How is it defamatory of me that
19 somebody else treated me like an intellectual gigolo? I
20 don't understand that.

21 MR. MORGAN: But it's you who in this fabricated
22 quote is saying, "I was like an intellectual gigolo," and
23 it never occurred.

24 QUESTION: In context it didn't mean I was like
25 one. To them I was like an intellectual gigolo. That is

1 how they treated me.

2 QUESTION: Yes, I was going to ask you the same
3 question. It seems to me that a reasonable interpretation
4 of that quote is that Eissler and Anna Freud thought of
5 him as an intellectual gigolo, and he is reporting that.
6 I mean, that's -- that's the sense in which -- the fair
7 sense, I think, in which to read that. And I wanted to
8 ask you, number one, whether I am entitled or we must
9 parse that meaning or whether this is a question for the
10 jury?

11 MR. MORGAN: That's a question for the jury.
12 And in California, as you know --

13 QUESTION: The reasonable interpretation --

14 MR. MORGAN: Well, as Your Honor knows, if there
15 are two reasonable interpretations, one defamatory and the
16 other not defamatory, the court will assume it's
17 defamatory. So we are certainly entitled to that. But I
18 go the step further that even the fact of Mr. Masson
19 purportedly saying, two of the highest people in the --
20 psychoanalytic world regarded me as an intellectual
21 gigolo, is defamatory, because it is going to expose him
22 to ridicule, humiliation, and obloquy, and it will
23 certainly tend to harm him in his business.

24 I'd like to take two more, just if I could, and
25 quickly. The one about I put it on at the end, or I

1 tacked it on at the end. The only point I want to bring
2 out about that one is the point -- the question that
3 supposedly he side-stepped and didn't answer, was never
4 asked of him. And Ms. Malcolm concedes that. She said
5 no, I never really did ask him. That was just my state of
6 mind. And yet she fabricates a whole conversation. And
7 yet the court says well, there has been no alteration of
8 the substantive content. It was a total fabrication.

9 Now this is when we get back to the Carson case,
10 where in the Carson case they talk about that the writer
11 invented this whole discussion between Mr. Carson and the
12 NBC officials. This is really no different. She invented
13 a conversation that never took place. Now, the Ninth
14 Circuit has said the rule is that it has to be wholly
15 fabricated, and I don't know of any case that really
16 supports a wholly fabricated. What is the difference
17 whether you fabricate one line of questioning based upon a
18 conversation or based upon something you read in a
19 magazine or a newspaper, as in Carson?

20 Then I would all --

21 QUESTION: Every new -- every new decision is
22 for the first time, and every new decision doesn't have
23 any precedent. So your -- but you -- so you have to say
24 the court of appeals is just wrong.

25 MR. MORGAN: I do. I've said that.

1 QUESTION: I know you do, because there isn't
2 any precedent.

3 MR. MORGAN: This is one time I have no
4 hesitation in saying that absolutely, Your Honor.

5 I would like to also talk about the greatest
6 analyst who ever lived, and again, the Ninth Circuit says
7 this is supported because he made other boastful
8 statements. He never said, and you can go through all the
9 tapes there, he never once said that the analyst will ever
10 think he is great. In fact he said just the opposite.
11 And she knew all of this, and yet she fabricated this
12 quote.

13 Now, the Ninth Circuit says, well, that's okay,
14 because after all, at another point he said analysis is
15 going to stand or fall with me. But he points out it's
16 not me, it's the letters I found, the letters that
17 question what Dr. Freud had said or done. That's the type
18 of statements he made, and he said -- there's no question
19 he thought his book was going to do well. He thought his
20 book was going to be harmful to the profession. But he
21 said not one analyst will stand up and speak for me. And
22 yet the quote says they'll say I'm the greatest analyst
23 after Freud, I'm the greatest analyst that ever lived.
24 And yet not one thing to support it, but the Ninth Circuit
25 says, well, he had boasted on other occasions. I think

1 the Court can see the great harm that can befall that.

2 QUESTION: Suppose -- suppose what he had said
3 was there is no greater analyst than I other than Freud,
4 and she quotes him as saying I am the greatest analyst
5 ever other than Freud?

6 MR. MORGAN: Oh, I think there's no problem with
7 that, Your Honor.

8 QUESTION: Why is there no problem with that?

9 MR. MORGAN: Because all that has happened --

10 QUESTION: It's a misquote, right?

11 MR. MORGAN: Of course it's a misquote.

12 QUESTION: And she -- let's say she
13 intentionally misquotes it because it takes up less space
14 that way.

15 MR. MORGAN: Well, I don't think it'll take up
16 less space --

17 QUESTION: Whatever.

18 (Laughter.)

19 MR. MORGAN: -- but all that has happened is --

20 QUESTION: But she knows, she knows it's a
21 misquote. Okay?

22 MR. MORGAN: That's right. But all that's
23 happened is she has changed the words, but they are the
24 same words.

25 QUESTION: She has changed the words, but they

1 are the same words?

2 MR. MORGAN: That's right. She has moved the
3 sequence of them.

4 QUESTION: That's nice. She has misquoted him.

5 MR. MORGAN: That's right. That's right.
6 There's no question she has misquoted him.

7 QUESTION: Now, that has to go to the jury,
8 right? And you say if under State law there is some
9 incremental doctrine, maybe they won't recover, but a
10 court has to let that go to the jury.

11 MR. MORGAN: No. And I'm not saying that, Your
12 Honor.

13 QUESTION: Well then, why? Why doesn't it go to
14 the jury? It is clearly a misquote.

15 MR. MORGAN: As we put in our brief, and I think
16 it's the same thing. Supposing he had said I am the
17 greatest analyst, and she wrote he said I am the greatest
18 therapist.

19 QUESTION: Um-hum.

20 MR. MORGAN: They're basically the same thing.
21 No change. As I understood the question you posed to me
22 --

23 QUESTION: Is it defamatory in isolation? Yes.
24 Right? Is it a misquote? Yes. Why doesn't it go to the
25 jury then?

1 MR. MORGAN: Because the words are the same,
2 except for the one change.

3 QUESTION: So built into your doctrine then
4 there is some comparative, if indeed her quotation is a
5 fair summary of what he has said then, it shouldn't go to
6 the jury.

7 MR. MORGAN: Yes. But it's not --

8 QUESTION: Right?

9 MR. MORGAN: It's not because of incremental
10 damage or incremental harm.

11 QUESTION: Why?

12 MR. MORGAN: It's because of the substantial
13 truth doctrine. Now, you see, we take the position that a
14 quote is no different than a statement of fact. Let me
15 give you an example, and forgive me for being from
16 California and doing this. But I can say that the
17 reporter says I saw Nose Tackle Carter run 60 yards for a
18 touchdown. Or -- and then it quotes Nose Tackle Carter as
19 saying well, I lumbered for 61 yards for a touchdown.
20 That's a substantial truth. There's nothing really
21 changed there. That's so different.

22 QUESTION: Especially if he weighs 315 pounds.

23 MR. MORGAN: That's right.

24 (Laughter.)

25 MR. MORGAN: That's why I couldn't resist it,

1 Your Honor. There's no difference.

2 But then -- let me give you one that was in the
3 amicus brief that I think is important. I make the
4 statement my mother and father never got married. You
5 write that I make the statement I am a bastard. Now
6 there's, there's the difference. And --

7 QUESTION: What if it's just reversed? What you
8 said was I am a bastard and he wrote my mother and father
9 never got married? What do you do with that case?

10 MR. MORGAN: Well, that's the Hotchner case.

11 QUESTION: Well, I don't know the Hotchner case.
12 What do you do with the case yourself?

13 (Laughter.)

14 MR. MORGAN: Well, I really don't think that you
15 can show any damage there. And I'm hard pressed with that
16 one, there's no question about it.

17 QUESTION: It seems to me it was easy when we
18 asked you at the beginning of the argument. You said it
19 was clearly -- would create an inference of malice.
20 That's exactly the hypothetical I gave you.

21 MR. MORGAN: That's right. The inference is
22 still there. I'm not going to win it.

23 QUESTION: So it goes to the jury, or does it
24 not go to the jury?

25 MR. MORGAN: I have a feeling in that one that

1 the court would grant summary judgment, and I don't think
2 any appellate court would --

3 QUESTION: Well, what if we thought each of
4 these was just like that? That the real facts, if you
5 read the whole book, are even worse than the intellectual
6 gigolo.

7 MR. MORGAN: Your Honor, if --

8 QUESTION: If we thought that. I mean --

9 MR. MORGAN: I understand.

10 QUESTION: -- what if we read it carefully and
11 we come to that conclusion?

12 MR. MORGAN: If you thought that the two
13 statements I related were equivalent to Mr. Masson saying
14 I'm an intellectual gigolo, I'll pack my bags and leave
15 now, you know, because --

16 QUESTION: Well, but it's a question of your
17 theory. It seems to me you're giving away your theory. I
18 had thought that the fact that it is reported someone says
19 something about himself is indicative of hypocrisy, and
20 it's an altogether different formulation than if someone
21 makes that same statement as a third person. But you seem
22 to be giving that away.

23 MR. MORGAN: Well, if I am, I'm getting weary
24 then, because I don't intend to give that away. But
25 certainly in that situation that Justice Stevens

1 propounded, I have difficulty with ultimately winning it,
2 is what I'm trying to say. I still say we're entitled to
3 the inference of malice.

4 QUESTION: Aren't you saying two things? Aren't
5 you saying, number one, that a misquotation or the fact of
6 misquotation, in and of itself, is competent evidence of
7 malice? Whether the question of malice goes to the jury
8 depends on what else there is in addition to the evidence
9 of the misquotation.

10 MR. MORGAN: Absolutely, Your Honor.

11 QUESTION: If the misquotation in fact, as you
12 said a moment ago to Justice Stevens, could not give rise
13 to and -- could not be a predicate for damage, then in
14 fact you're really saying on that particular misquotation
15 in the context of the actual misquote no reasonable juror
16 could infer malice from it. Isn't that all you're saying?

17 MR. MORGAN: Absolutely, Your Honor. And I want
18 to sit down now, because I want to save a few minutes.

19 Thank you.

20 QUESTION: Thank you, Mr. Morgan.

21 Mr. Farr, we'll hear from you.

22 ORAL ARGUMENT OF H. BARTOW FARR, III

23 ON BEHALF OF THE RESPONDENTS

24 MR. FARR: Mr. Chief Justice, and may it please
25 the Court:

1 In briefly setting out our position at the
2 outset, I'd like to begin with what I think is an obvious
3 point: that libel law is not concerned with misquotation
4 for its own sake or with setting journalistic standards.
5 What libel law is concerned with is misrepresentations of
6 substance with a defamatory gist of things.

7 QUESTION: Are you talking about the 50 -- the
8 laws -- the libel laws of the different States now?

9 MR. FARR: In general, that's correct. All the
10 libel laws.

11 QUESTION: You feel you can make that sort of
12 generalization?

13 MR. FARR: Yes. I think all libel laws at
14 bottom are concerned with misrepresentations of substance.

15 Under the balance struck by New York Times v.
16 Sullivan and later cases, the First Amendment gives way
17 only when a writer knows or reasonably suspects or
18 recklessly disregards that the defamatory gist is false.
19 That's the same rule for all libel cases, whether they
20 involve quotations or not, and that's simply the point
21 we're trying to make here. The First Amendment protects a
22 writer accused of misquotation unless the plaintiff can
23 show that the writer strongly suspected that he was
24 misrepresenting the gist of what was said.

25 QUESTION: So if I'm running in an election

1 campaign and I -- and my opponent accuses me of being a
2 racist on the basis of some substantive positions I take,
3 and it's arguable. I mean, it's a reasonable thing to say
4 those positions could be based upon somebody's being a
5 racist. It is perfectly okay and not actionable if a
6 reporter who happens to buy into that theory quotes me as
7 saying yes, I am a racist? There's no -- there's no
8 action available for that?

9 MR. FARR: If I understand the hypothetical,
10 Justice Scalia, I don't think --

11 QUESTION: A reasonable person could think, on
12 the basis of my actions and on the basis of my other
13 statements, that I am a racist. And that's what the
14 political debate would be about. I deny it; they say it's
15 true. This reporter believes it, and therefore this
16 reporter is permitted to write about me, Scalia said "Yes,
17 I am a racist."

18 MR. FARR: Justice Scalia, I think, as I say, if
19 I understand the hypothetical, that that reflects an
20 exaggeration of the position that I am trying to make. I
21 think, quite frankly, the same exaggeration that Judge
22 Kozinski made below. What -- the point that I am making
23 --

24 QUESTION: It's my hypothetical. What is --
25 (Laughter.)

1 MR. FARR: Well, let me explain that point that
2 I am trying to make, if I may.

3 QUESTION: All right.

4 MR. FARR: The point that I am trying to make is
5 that the inquiry is into whether the writer is knowingly
6 misrepresenting something that was said, the substance of
7 something that was said. Not somebody's character in
8 general, not their views on other issues that they were
9 not talking about, but a -- the particular subject matter
10 that was talked about and the views expressed by the
11 speaker on that subject matter. If there is no knowing
12 misrepresentation, thus limited, then it seems to me that
13 no more than there would be if there was a direct
14 paraphrase do you have any situation where the writer is
15 knowingly misrepresenting the defamatory gist of what is
16 being said.

17 QUESTION: So you say that a false statement by
18 a reporter in an article, such as Mr. Masson said this
19 when he in fact did not say it, is -- cannot form any
20 basis for inferring malice?

21 MR. FARR: No, Mr. Chief Justice, I don't mean
22 to say that. What I am saying is that simply showing that
23 there may be knowledge of different words is not itself
24 all you need to prove malice.

25 QUESTION: Well, it may -- but could it go to

1 the jury as evidence of malice?

2 MR. FARR: It would depend on the particular
3 circumstance. There may be circumstances in which a
4 reporter accused of misquotation, where the form of the
5 accusation and the materials about what was actually said
6 would support an inference of knowing --

7 QUESTION: What about Justice Scalia's
8 hypothetical?

9 MR. FARR: If I understand his hypothetical --

10 QUESTION: Yes, I am a racist is the false
11 quote.

12 MR. FARR: I do not understand -- I do not
13 understand that there is something particular that has
14 been said in that case that is being represented by the
15 reporter.

16 QUESTION: Well, I would suggest that the very,
17 that the very circumstance that someone makes an admission
18 of that sort, allegedly, is itself a fact that is being
19 highly misrepresented. It's false.

20 MR. FARR: If he has made an admission, if --
21 again, maybe I'm not clear on the hypothetical. What I am
22 understanding you to say is that somebody is drawing an
23 inference about character and simply inventing a quote
24 based on that idea of character. If you say things -- for
25 example, if you say I have a strong prejudice against a

1 particular racial group, and someone, and you are quoted
2 as saying that you are a racist with regard to that
3 particular group, then it seems to me the question is not,
4 well, does that settle the malice inquiry just because the
5 words are different and you can make an accusation that
6 the reporter knew the words were different. The malice
7 inquiry then turns to the question is there sufficient
8 evidence from that alone, or even combined with other
9 evidence, as Justice Souter suggests, that the writer was
10 knowingly misrepresenting the substance of what you said.

11 QUESTION: Mr. Farr, why should it be that way?
12 Why should -- why should an intentional alteration of my
13 words be at my risk? Why shouldn't the rule be if you
14 want to -- knowingly. You have to know that you are
15 changing them. If it's a good-faith mistake, that's
16 something different. But you know that you are not using
17 my real words. Why should -- why should I be at risk? It
18 seems to me you should be at risk, if in fact, if in fact
19 it misrepresents me, even if you don't think it does.
20 That's your tough luck. You should have quoted me
21 exactly. Then you would have been sure not to be liable.
22 But if in fact, though you think it doesn't misrepresent
23 me, it does misrepresent me, why shouldn't you bear that
24 burden?

25 MR. FARR: Well, first of all I think that there

1 are two parts to the answer. The first part, which is the
2 sort of legal analysis, is that I think that creates a
3 separate malice rule for quotations as opposed to other
4 ways of describing what somebody says, such as
5 paraphrases, which focuses on one particular kind of
6 falsity and not the same falsity that is the gist of the
7 --

8 QUESTION: I don't think so. If, for
9 misquotation, as for everything else, you must know that
10 what you wrote is not true.

11 MR. FARR: The question, though, is what exactly
12 is the gist of the action? What is the core of the
13 action? The falsity you were talking about is simply a
14 falsity of words. You cannot win a libel action, you
15 cannot bring an action, you cannot base an action for
16 defamation on simply saying the words are different.

17 QUESTION: But the --

18 MR. FARR: The falsity you must show is
19 something different.

20 QUESTION: But this falsity of the gist is
21 something that you have urged, but I don't know that our
22 cases support it.

23 MR. FARR: Mr. Chief Justice, I believe they do.
24 That certainly California law, in order to bring an
25 action, and I'm talking about now the interest that they

1 are pursuing --

2 QUESTION: But we don't have any question of
3 California law before us.

4 MR. FARR: Well, it is the California law that
5 is intersecting with the First Amendment in this case, so
6 there -- that's correct, you don't have to decide
7 California law, but that is what the California law
8 represents.

9 But if I could return to the second point I was
10 going to make to Justice Scalia, what I suggest you're
11 doing in saying any time you knowingly change words to the
12 press, now you are assuming the risk. You essentially at
13 this point have strict liability for anything that you do
14 if it turns out to change the meaning --

15 QUESTION: Well, I think the question is a
16 little different. If the writer entirely fabricates the
17 language, it's not a misquote, it's an entire fabrication
18 to say that Mr. X said I am a racist. That isn't what Mr.
19 X said at all.

20 MR. FARR: Well, Justice O'Connor --

21 QUESTION: And a quote is fabricated to that
22 effect, which under State law would be regarded as
23 defamatory. Now, is that fact of the fabrication of the
24 quote something that raises an inference of actual malice?

25 MR. FARR: The accusation by itself, I think,

1 does not. Let me suggest that the difference between --

2 QUESTION: The quote. The intentional writing
3 of that quoted language, knowing that it was not said.

4 MR. FARR: I think it does not by itself raise
5 the inference of malice as I believe it is correctly
6 interpreted.

7 And let me give you an example of what I mean
8 from this case. In his complaint, and this is at page
9 260, this was the original complaint, petitioner alleged
10 that he had been quoted as saying analysis stands or falls
11 with me now. This is at page -- at the bottom of page
12 260. And he says in truth Masson never said such. So he
13 is accusing Janet Malcolm of a total fabrication with this
14 quote.

15 Now, fortunately, it turned out that we had
16 absolute evidence of this quote because this quote was on
17 the tape, that he said exactly these same words. But let
18 us assume for a minute that we were in the posture we are
19 with several of the quotes that are still at issue here,
20 that all that we had was notes representing the substance
21 of this quote. He would be saying right now that he is
22 entitled to go to the jury, simply based on his denial of
23 those words, even though in fact we have undisputed
24 evidence that on that particular subject about his place
25 in psychoanalysis he said not only analysis stands or

1 falls with me now, but we also have evidence that he said
2 substantially equivalent things. I suggest that looking
3 at that evidence, which we would not be able to look at
4 under petitioner's rule, negates any inference that the
5 writer could have knowingly been trying to misrepresent
6 the substance of his views on that particular subject.

7 QUESTION: Why don't you get to look at the
8 evidence on the question of damage?

9 MR. FARR: It is -- well --

10 QUESTION: The evidence would come in on the
11 subject of damage.

12 MR. FARR: It might. But I'm saying on the
13 subject of malice, I believe it ought to come in on the
14 subject of malice. Because what -- the balance I believe
15 struck by New York Times v. Sullivan between State libel
16 law and the First Amendment is one that looks at knowingly
17 misrepresenting substance, not simply knowingly
18 misrepresenting words. And his rule essentially would
19 take that case that I just used, based on an accusation of
20 misquotation, and move that case to the jury.

21 QUESTION: You have no -- I mean, I don't see
22 this distinction between knowingly misrepresenting
23 substance and knowingly misrepresenting words. It is
24 knowingly misrepresenting substance to say that I said
25 something which you know I did not say. The substance is

1 did I say it. I did not say it.

2 MR. FARR: It is knowingly -- I mean, in that
3 hypothetical case where the writer in fact is proved to
4 have known of the misrepresentation it, arguably I
5 suppose, could be said to be substance, but not defamatory
6 substance. That's what I'm saying. That is what the
7 actual malice test in every other circumstance focuses on.

8 If I can use an example of a paraphrase, let's
9 say that instead -- take the particular quotes here,
10 anyone you want. Sex, women, fun, perhaps.. Let's say
11 that the sentence read exactly the same way it reads now,
12 except instead of using -- putting quotation marks around
13 the word sex, women, fun, it was a paraphrase that said
14 Jeffrey Masson said that if he lived in the Freud house in
15 London he would turn it into a place of sex, women, fun.
16 Period. No quotation marks.

17 The standard for evaluating actual malice in
18 that case, with the paraphrase, would be did the writer
19 knowingly change the defamatory substance of that
20 statement. And given other statements on exactly the same
21 subject, not things showing his character generally, but
22 on exactly that same subject, what would he do if he lived
23 at the Freud house in London, it's clear there would be no
24 misrepresentation --

25 QUESTION: No, I don't think your point -- your

1 point of view makes enough allowance for the fact that
2 putting words in someone's mouth as having said it
3 themselves can hit a lot harder than having some third
4 person describe what they think the person said.

5 MR. FARR: Justice Rehnquist, I think that is
6 true, but perhaps less true than it seems at first blush.
7 I think that usually the most potent effect out of
8 attributing something to a speaker is that you are
9 attributing the content of what he says to the speaker,
10 that he says something derogatory about someone else.
11 It's not normally the particular choice of words.

12 QUESTION: No, what makes the difference, Mr.
13 Farr, is that you, as the writer, you take yourself out of
14 the picture. When I read a statement he said that, and
15 it's under, it's over your byline, I say well, that's
16 Farr's interpretation of it. But when you said he said,
17 quote, then I say, gee, that's -- he said that. That's
18 not -- Farr is out of the picture now. This is what the
19 individual said. That is a big difference. I no longer
20 make allowances for your erroneous judgment. You are
21 asking me to eliminate any possibility of your erroneous
22 judgment. You're saying this is what he said, quote.

23 MR. FARR: But the question, as I understood the
24 Chief Justice to ask it, isn't the fact that words are
25 attributed to somebody much more powerful. That is the

1 idea of a quote. I think there are two different
2 circumstances that have to be compared and kept in mind.
3 First of all, the words are attributed to him, but other
4 words could be attributed to him, let's say undisputedly,
5 that would have the same power. So, for example let's
6 say, instead of saying sex, women, fun with regard to how
7 he would conduct himself at the Freud house, he was quoted
8 as saying myself and another psychoanalyst would pass
9 women around to each other and we would have a wonderful
10 time and we would -- we would open it up --.

11 QUESTION: It would show he didn't know how to
12 use the word "myself."

13 (Laughter.)

14 MR. FARR: Well, I can't lay that on him. I
15 think it shows I don't know how to use it.

16 (Laughter.)

17 MR. FARR: But in any event, I think the power
18 of the sentence would be from the content of the sentence
19 in that particular case, and the fact that he holds those
20 views, that's what in fact he would do if he went into
21 something that is now a place of scholarship. The
22 particular choice of words in that particular situation
23 wouldn't make any difference. There may be situations
24 where a paraphrase would be different from a quote,
25 because depending on the nature of the paraphrase it would

1 put a filter in there. And there may -- excuse me --

2 QUESTION: Mr. Farr, you said -- suppose the
3 writer, as you've just suggested, would write and say he
4 said wine, women, and song. And he got sued for it. Now,
5 the plaintiff's burden of proving falsity would go no
6 farther than proving that he didn't say that.

7 MR. FARR: His -- under the plaintiff's theory
8 here --

9 QUESTION: Yeah. He says I'm suing you because
10 you said I said something that I did not. I don't care
11 whether it's in quotation marks or not. I didn't say
12 that, and I'm going to -- and his burden -- he's suing
13 because you misrepresented what he said. And his burden
14 or proving falsity will go only to proving that he didn't
15 say it.

16 MR. FARR: His burden --

17 QUESTION: He wouldn't have to prove the falsity
18 of the content.

19 MR. FARR: Justice White, I believe he would.
20 If I understand your question --

21 QUESTION: You mean he would -- he really
22 wouldn't -- he really wouldn't, if he had that house, do
23 what he was -- what the reporter said he would?

24 MR. FARR: I'm sorry. He would have the burden
25 of proving both that he would not do that, and that the

1 reporter knew that he would not do that.

2 QUESTION: You think he would have to prove
3 that? But he is only suing because he has -- he has been
4 misquoted. He (inaudible) claim that that's --

5 MR. FARR: I'm sorry. Excuse me, I've
6 misunderstood. I don't think he has to prove what his
7 conduct actually would be in the Freud house.

8 QUESTION: Exactly.

9 MR. FARR: I'm sorry, if that's what you're
10 saying.

11 QUESTION: Exactly.

12 MR. FARR: But what he would have to do if he
13 sued -- let's say under my -- under the hypothetical I was
14 using, if he did sue and say this misrepresents what I
15 said about what I would do, he would have to show that he
16 did not in substance say that. That's what he would have
17 to do. And he would -- his malice inquiry would turn on
18 that substance, not simply on whether there was a
19 difference in the words.

20 QUESTION: But Mr. Farr, we have here self
21 evaluative statements or alleged statements, greatest
22 analyst, honorable man, intellectual gigolo. Now, these
23 are quotations of a markedly different character if they
24 are attributed to one's self. It's far different if
25 someone says I am a racist than for a third person to say

1 he is a racist. That's far different.

2 MR. FARR: That's correct, and I don't dispute
3 that. We are not suggesting, Justice Kennedy, that in
4 determining whether there has been a knowing
5 misrepresentation of the substance of what someone has
6 said, that you could use words said by somebody else about
7 him as part of the question as to whether there was a
8 knowing misrepresentation of substance. What I am
9 suggesting -- perhaps it would be helpful at least if I
10 indicated what I think the proper way to go about the
11 inquiry is, because I think it will show that we're not,
12 for example, talking about as broad a theory as I think
13 were attributed to us.

14 The -- it seems to me that when someone accuses
15 a reporter of misquotation, that the proper malice inquiry
16 is to look at the substance of all of the things that the
17 person has said, particularly to that reporter, on the
18 subject. Then you would take the disputed parts, because
19 I'm assuming we're at the summary judgment stage, the
20 disputed parts and the undisputed parts, and make a
21 comparison between them. If, based on that comparison,
22 one could draw a conclusion that the addition of the
23 disputed words will carry an inference that there is a
24 knowing change in the overall substance of what he said,
25 then it seems to me that you could draw an inference of

1 actual malice.

2 QUESTION: To put it differently, if a
3 reasonable person could have given the words that
4 interpretation, even though another reasonable person
5 might not have given them that interpretation, putting it
6 in quotation marks is okay, right? All it has to do is be
7 a -- a reasonable interpretation of the words, right? And
8 there would be no liability then, so long as it's one of
9 many reasonable interpretations, to put it in quotes?

10 MR. FARR: I don't mean to be ironical, but I
11 don't think that's a reasonable interpretation of what I
12 said.

13 QUESTION: I thought that that's what -- but I
14 thought that's what the test is. Wouldn't you have to
15 show that -- to show malice don't you have to have knowing
16 distortion?

17 MR. FARR: You do have to have knowing
18 distortion, but I don't understand why the mere rational
19 interpretation test would necessarily protect you from
20 that. It might in some cases.

21 QUESTION: How could I show knowing distortion
22 if that is one of several reasonable interpretations of
23 the words? I -- how could I possibly prove knowing
24 distortion? It's not the only interpretation, but it is
25 one of several reasonable ones.

1 MR. FARR: Well, I mean, I suppose I guess it
2 depends on the other issues. I mean, it seems to me that
3 the basic test, as I say, is whether there is a,
4 sufficient evidence of a knowing misrepresentation of
5 substance. I think that's what the proper inquiry should
6 be.

7 QUESTION: Could a -- in the eyes of a
8 reasonable juror?

9 MR. FARR: Pardon me?

10 QUESTION: In the eyes of a reasonable juror?

11 MR. FARR: That's correct, if we're talking
12 about the summary judgment stage, that's correct.

13 QUESTION: Mr. Farr, in this case if we take
14 your test to take all of the substance of what was
15 actually said and compare it to all of the substance of
16 what was quoted, are the use of quote -- is the use of
17 quote marks one of the factors that we may take into
18 consideration?

19 MR. FARR: Again, if I understand the question,
20 I think it would be. I would think -- let me take an
21 example so that at least what I am thinking of may become
22 clearer. If -- there are cases, I believe, where a choice
23 of words would be so out of character for the plaintiff or
24 would reflect so differently on his character than the
25 content of what was being said, that there may be an

1 additional defamatory gist out of that word, that choice
2 of word itself, the type of sort of trivial example, I
3 guess, that occurs to me is a parson swearing.

4 QUESTION: But Mr. Farr, you're giving us an
5 example of what would constitute clear and convincing
6 evidence of malice. It seems to me there are two separate
7 questions. One is whether every misquote is competent
8 evidence of malice, as Justice -- Souter points out. And
9 it would seem to me that the mere fact that there is a
10 misquote and they knew it, that's some evidence. Maybe
11 it's not strong enough to go to the jury or clear and
12 convincing. But then the second case is whether, is it
13 strong enough to constitute clear and convincing evidence.
14 I think you're arguing that it's no evidence at all.

15 MR. FARR: Justice Stevens, I don't mean that to
16 be the argument. What -- perhaps I can be clearer by
17 saying I agree with both parts of what you say. What I am
18 emphasizing, I suppose, with regard to the first part is
19 that it is important, I think, to understand what the
20 inquiry is, what it is that we are looking at the words
21 for. And that is all I'm saying. I think that the
22 purpose of looking at the words is to determine whether
23 there is a knowing misrepresentation of what I keep
24 calling the gist.

25 The fact that there is a difference in words by

1 itself, if you don't connect it to that other inquiry, I
2 think means nothing. I think once you connect it to that
3 other inquiry, then I think it is relevant.

4 QUESTION: Well, you can't say it means nothing
5 if it's admissible competent evidence. It's just not
6 sufficient. I don't think you can correctly say it means
7 nothing. The very fact of misquotation means something.
8 Your opponent concedes that there are lots of
9 misquotations that are not sufficient to go to the jury.
10 So I don't -- I'm not sure you don't -- couldn't really
11 agree on that and not decide this case. That it certainly
12 is competent evidence, I would think, to show that the
13 quote was different from what was actually said. But
14 that's very different from the example of saying I am a
15 racist, and he never said anything.

16 MR. FARR: All right. Perhaps I stand
17 corrected. I think I see a distinction there, but I don't
18 feel that I need to defend that distinction to answer the
19 point you're making.

20 QUESTION: May I -- I'm sorry, I didn't mean to
21 interrupt you.

22 MR. FARR: Of course, Justice.

23 QUESTION: May I try the distinction? It seems
24 to me in your argument you have posited three different
25 kinds of situations, or we all have, I guess. Number one,

1 you got a third person quote and a misquote attributed to
2 a third person. You got a first person quote and a
3 misquote attributed to the first person. And the third
4 example is you've got a third person quote, or at least
5 third person evidence, and you misattribute that by means
6 of a first person quote. If I understand you, you're
7 saying that when we've got simply the misquotation as
8 between two third parties, the mere fact of the
9 misquotation may be, as I was trying to say, competent
10 evidence of malice, but it is not sufficient in and of
11 itself as an abstract matter to rise to the level of clear
12 and convincing evidence of malice. Is that a fair
13 statement?

14 MR. FARR: Depending perhaps on the amount of
15 difference, but generally that is correct.

16 QUESTION: Right. Okay.

17 Likewise, you have been arguing, I think, that
18 when there are, when we're talking about differences
19 between two first person quotes, you're saying, I think
20 you're conceding again yes, a misquotation can be some
21 evidence of malice, but it is not enough to go to a jury
22 because unless it is just an absolutely egregious example
23 that totally changes the substance it could not rise to
24 the level of clear and convincing.

25 MR. FARR: That is correct.

1 QUESTION: Justice Scalia's example is the third
2 person quote, or we'll say just the non-first person
3 evidence, which is suddenly placed by means of a
4 misquotation into a -- into a statement in quotes
5 attributed to the first person. His argument was when
6 that statement, misattributed to the first person, is
7 defamatory, isn't that enough in and of itself to
8 constitute sufficient evidence for a clear and convincing
9 finding? What is your answer to that?

10 MR. FARR: Um, I guess I'm not --.

11 QUESTION: And take his example. I am a racist,
12 when he never said he was a racist. Isn't that sufficient
13 to go to the jury in and of itself as clear and
14 convincing?

15 MR. FARR: I may be having more difficulty than
16 I should in keeping the categories apart. At least what
17 I'm thinking of as I understand that, Justice Scalia's
18 quotation -- I mean hypothetical -- is more the second
19 situation. I mean, at least that's what I think we are
20 dealing with in this case, is the situation of first
21 person quotations. I don't see in this case a situation
22 where the person being quoted has not addressed the
23 subject of any of the quotes we're talking about here. He
24 clearly discussed what he would do at the Freud house. He
25 clearly discussed how Anna Freud and Dr. Eissler viewed

1 him. He clearly discussed the other things that are being
2 presented.

3 So it does not seem to me here that you have a
4 situation where you are reaching out to something and
5 saying I am going to bring in substance from somewhere
6 else and attribute it to this person. What it seems to me
7 this case involves is the case where the reporter says I
8 am dealing with the views of Jeffrey Masson on this
9 subject, here is what I represent him as having said.
10 Jeffrey Masson, like many plaintiffs, claims he was
11 misquoted. And I believe the right inquiry is, on the
12 actual malice standard in that case, is there clear and
13 convincing evidence that by representing what he said on
14 this subject or these subjects the writer was knowingly
15 trying to misrepresent what he in fact said. And all I am
16 saying is that --

17 QUESTION: And it's your position that if not,
18 if the writer knowingly misquoted but thought that in the
19 writer's opinion that was a fair representation of what
20 the person said, there's no remedy on the part of the
21 person who is putting quotation marks?

22 MR. FARR: But libel law does not provide that
23 remedy, Your Honor. I am saying that that is the balance
24 struck in New York Times v. Sullivan between knowing
25 misrepresentation of substance and the law of libel of the

1 various States.

2 QUESTION: New York Times v. Sullivan had absent
3 a knowing -- one knowing lie, namely the lie that the
4 person actually said that. That is a lie. What New York
5 Times said is if you did not have any knowing lie at all,
6 you thought everything you said was the truth, then there
7 cannot be a remedy under the First Amendment. But here
8 you do have one unquestionable lie. You know that that
9 quote was not uttered.

10 MR. FARR: Well, let me back up a step. But New
11 York Times v. Sullivan also said, of course, that threat
12 of sanctions in many cases is almost as chilling as the
13 sanctions themselves. Here you have the threat of that
14 coming out of any accusation of misquotation, the issue of
15 whether it's deliberate or not simply is part of the
16 accusation.

17 QUESTION: Thank you, Mr. Farr.

18 Mr. Morgan, do you have rebuttal? You have 2
19 minutes remaining.

20 REBUTTAL ARGUMENT OF CHARLES O. MORGAN, JR.

21 ON BEHALF OF THE PETITIONER

22 MR. MORGAN: All I need is a minute, Your Honor.

23 Following up on that subject, the knowing lie
24 creates the inference of malice. The question of the
25 substance --

1 QUESTION: Does it create clear and convincing
2 evidence of malice in every case?

3 MR. MORGAN: Yes, sir.

4 QUESTION: Will you --

5 MR. MORGAN: I don't want to go through that
6 because I haven't got that much time. But what I wanted
7 to add was the next step is the element of damage. The
8 substance argument comes only into the element of damage.
9 Now again, the knowing lie that's defamatory --

10 QUESTION: But even in your 80-yard run case
11 it's clear and convincing evidence of malice?

12 MR. MORGAN: No, that's right.

13 QUESTION: All right, then you don't mean what
14 you said.

15 MR. MORGAN: Right. Thank you, Your Honor.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Morgan.
17 The case is submitted.

18 (Whereupon, at 2:59 p.m., the case in the above-
19 entitled matter was submitted.)

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CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that
the attached pages represents an accurate transcription of
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Supreme Court of The United States in the Matter of:

No. 89-1799 - JEFFREY M. MASSON, Petitioner V. NEW YORKER
MAGAZINE, INC., ALFRED A. KNOPF, INC., AND

JANET MALCOLM

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

BY *Robert Stuart Antel*
(REPORTER)

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