

# Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

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GREENBELT COOPERATIVE PUBLISHING  
ASSOCIATION, INC., et al.

Petitioners

vs.

CHARLES S. BRESLER,

Respondent

----- x

Docket No. 413

pt. 2

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Place Washington, D. C.

Date February 25 1970 ←

**ALDERSON REPORTING COMPANY, INC.**

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ARGUMENT OF:

P A G E

Abraham Chasanow, Esq., on behalf  
of Respondent

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REBUTTAL

Roger A. Clark, Esq., on behalf  
of Petitioners

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

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GREENBELT COOPERATIVE PUBLISHING )  
ASSOCIATION, INC., ET AL, )  
) )  
) )  
Petitioners )

vs ) No. 413

CHARLES S. BRESLER, )  
) )  
Respondent )  
) )  
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The above-entitled matter came on for a continuation of argument, at 10:35 o'clock a.m. on Wednesday, February 25, 1970.

BEFORE: WARREN E. BURGER, Chief Justice  
HUGO L. BLACK, Associate Justice  
WILLIAM O. DOUGLAS, Associate Justice  
JOHN M. HARLAN, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

ROGER A. CLARK, ESQ.  
1730 K Street, N.W.  
Washington, D. C. 20006  
Attorney for Petitioners

ABRAHAM CHASANOW, ESQ.  
151 Centerway  
Greenbelt, Maryland 20770  
Attorney for Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Greenbelt Cooperative Publishing against Bresler.

Mr. Chasanow, you may proceed whenever you are ready.

ORAL ARGUMENT BY ABRAHAM CHASANOW, ESQ.

ON BEHALF OF RESPONDENT

MR. CHASANOW: Mr. Chief Justice, and may it please the Court: The Petitioners in this case contend that the evidence is constitutionally insufficient to support the judgment, and as a basis for that contention they refer to three of the 45 exhibits which were introduced by the Respondent which the trial court instructed the jury to consider and which they did, in fact, consider.

Now, some of those exhibits are contained in the printed record; other are not as important as the major exhibits are in the transcript.

But the Court of Appeals specifically made mention of the fact that in addition to the publications that Mr. Bresler has committed blackmail, there were publications that he had engaged in an unethical trade, had been guilty of skulduggery, had had numerous proceedings filed against him for failure to make construction corrections in accordance with county standards.

These allegations are injurious to Mr. Bresler and his business as a contractor, and were libelous per se.

1 The court had also previously referred in its opinion to  
2 another article which was published prior to three foregoing  
3 articles on April 22, 1955, before the blackmail articles and  
4 before Mr. Bresler became a candidate for Comptroller. And  
5 that was headlined: "City Battles Bresler on Two Fronts." There  
6 was a subcaption: "Court Suit." It was written by Petitioner  
7 Skolnik and it falsely alleged that the City and Bresler would  
8 also be at odds this week on the suit filed by the City against  
9 Ivy Homes, Inc., and Bachelor Village, Inc. comes before the  
10 Circuit Court.

11 Q Do you think it's fair to characterize the  
12 of the Court of Appeals' opinion as resting on  
13 the principal charge -- the blackmail charge?

14 A No, Your Honor --

15 Q There are references all the way through it to  
16 some of these other matters, but as I read the opinion the  
17 essence of it was the blackmail charge.

18 A We did not dispute the fact that this was the  
19 principal charge, but I would like to point out that in the  
20 second blackmail article, for example, there was the word,  
21 "skulduggery," and when Mr. Skolnik was asked on the stand about  
22 the word "skulduggery," he said, "This is the word that the  
23 reporter used in the article." When the reporter testified for  
24 the Petitioners, she said, "I did not use that word." That was  
25 inserted and, as frequently happens.

1           Now, this was a change and this was what the Court  
2 of Appeals also said was intended to impute dishonesty on the  
3 part of Bresler.

4       /           Q       What did the Trial Court refer to in instruc-  
5 tions to the jury?

6           A       The Trial Court specifically said that the jury  
7 should consider all of the articles in evidence and also in-  
8 structed the jury that it       to consider the entire context.  
9 Now, I emphasize that because one of the principal arguments is  
10 that the word "blackmail" is taken out of context and didn't  
11 mean what it said.

12                 But first, they had taken it out of context by  
13 publishing it as a caption in the first paragraph. Secondly,  
14 the reporters both said that they had not published all of  
15 their notes concerning the meeting, but that they had used the  
16 word "blackmail."

17                 The second reporter, the reporter for the second  
18 article said, "I selected out the word 'blackmail' to show it  
19 was Mr. Herling's word." But she said she didn't use all her  
20 notes and then I asked her why she left it out and she said  
21 "well, it had been used the week before and I thought it was  
22 proper to use it again in the article."

23                 The Court of Appeals makes one other important point  
24 and that is that these --

25           Q       Yes, but did the Trial Court refer specifically

1 to some documents?

2 A Oh, yes; the second blackmail article, exhibit  
3 two in the record.

4 Q What else?

5 A It referred to the blackmail article -- well,  
6 actually the court said it was not going to comment specifi-  
7 cally on the facts, but just briefly say what the, what some of  
8 the witnesses said. But, it didn't go into detail on the facts  
9 themselves.

10 Q In its instructions to the jury as far as any  
11 particular document was concerned, it only referred to the  
12 blackmail articles?

13 A No, sir; as a matter of fact, I don't recall  
14 that there was specific --

15 Q Well, that's all right.

16 A The Court of Appeals made one other point  
17 which is important to this issue; that to distinguish it from  
18 other articles which are published by a newspaper in which  
19 intemperate statements are made, it said that this was not a  
20 disinterested or impartial publishing of a report of what was  
21 said at a public meeting, and it pointed out that the people  
22 who had made the statements, there was a relationship between  
23 them.

24 The court said specifically, and I quote: "The close  
25 connection between the Skolniks, Mrs. Bergemann, Mrs. Rosetti

1 and Mr. Herling, those to whom the word 'blackmail' is  
2 attributed, Mrs. Sucher and Mrs. Williamson, who wrote the  
3 articles and Charles Swan, the President of GHI, and the  
4 principal opponent of Bresler on the high school and zoning  
5 issue.

6 Now, I think it might be well at this time --

7 Q Excuse me, Mr. Chasanow. May I ask a question?

8 A Yes.

9 Q Do I understand that the Respondent concedes  
10 that he had the burden of satisfying the New York Times test  
11 to get a recovery?

12 A We did concede that, Your Honor. I mean, for  
13 purposes of that and the Court of Appeals in arguendo.

14 Q Yes, but I am asking if the Respondent does  
15 concede the judgment stands only if he satisfied the Times test?

16 A May I make an exception to that, Your Honor?  
17 I think that this question of public officials has never been  
18 clearly defined. It is an important issue in this case in this  
19 respect: that their only constitutional defense was that  
20 Bresler was a public official. The evidence shows that at the  
21 time of the first two series of articles, Bresler was a Member  
22 of the House of Delegates in Montgomery County, a different  
23 county; not Prince Georges County.

24 There is no mention in any of the 45 exhibits that  
25 Bresler was a Member of the House of Delegates and none of these



1 articles pertained in any way to his official conduct which is  
2 emphasized in New York Times versus Sullivan.

3 Q What difference would that make, Mr. Chasanow?  
4 If he is a public official, must they identify him each time  
5 at his office in order to bring themselves under the Times and  
6 Sullivan rule?

7 A No, sir. I say this, because normally refer-  
8 ence is made to official conduct which has to identify the  
9 official. This case has nothing to do with official conduct  
10 and they didn't even think that there was any privilege attached  
11 to the fact that he was a public official, because they didn't  
12 mention it.

13 Even the article where they published the fact that  
14 it was going to be announced that he was to run for State  
15 Comptroller that the Governor, Vice President Agnew has asked  
16 him about it. Even that article didn't mention the fact that  
17 he was a Member of the House of Delegates. It had nothing to  
18 do with this case. We say that they are using this just as a  
19 cloak in order to say he was fair game because he happened to  
20 be a Member of the House of Delegates.

21 Q Well, on reading what I must confess are rather  
22 confusing instructions of the trial judge, particularly on two  
23 occasions, as I read it, the jury was called back and given  
24 rather explicit instructions, as I understand it, quoting  
25 verbatim, not only from Sullivan, but also from Garrison and

1 from Rosenblatt.

2 A Yes, sir; yes, sir.

3 Q And that's why I asked you -- this case cer-  
4 tainly was tried; wasn't it, on the premise that the Respondent  
5 recovered only if he satisfied the Times malice test?

6 A Yes, sir; that was the specific instruction --

7 Q And are we then to regard the issues that you  
8 have described as on the premise that this is a case within the  
9 Times-Sullivan requirements?

10 A Yes; if Your Honor will draw the distinction,  
11 Mr. Justice, between the Sullivan case and I'd like to point  
12 out that in my brief I have indicated there are limitless  
13 exceptions. One I would like to mention particularly, is in  
14 Mr. Justice Black's dissenting opinion in the Butts case --I'm  
15 sorry, the New York Times, rather, in a separate concurring  
16 opinion he referred to the New YorkTimes as an outside agitator.  
17 Inthe posture of the case here was the New York Times facing a  
18 hostile and prejudiced community in which they could hardly hope  
19 for a fair trial.

20 The Respondent in that case, Commissioner Sullivan,  
21 was a resident of Montgomery County; he was tried by a jury  
22 composed of residents of Montgomery County. He was attacking  
23 this foreign newspaper which was coming in and trying to tell  
24 him what to do.

25 We have, actually, the inverse situation in this case.

1 Mr. Bresler was foreigner; he was the outsider; he was coming  
2 into Greenbelt. Now, in order to put this case in proper  
3 perspective I'd like to mention one thing that the Court of  
4 Appeals noted: the Petitioner Skolnik, was a member of this  
5 organization identified as GHI, Greenbelt Homes, which had  
6 once owned the land in controversy, plus some 300 acres more.

7 The Federal Government had sold that land, together  
8 with the houses in Greenbelt to this corporation and said:

9 "We want you to control the development around it, so we are  
10 selling you this land at a low price." Instead of developing  
11 it, they took a quick profit; they sold it. Then they realized  
12 that they might have made a mistake and somebody else was  
13 making the profits that they might have made and, incidentally,  
14 in the first blackmail article, one of the Councilmen said, and  
15 he was a member of GHI: "How much profit is he going to make?"  
16 This was the burning question.

17 The other was, Mr. Bresler and his associates had  
18 plans which were interfering with their own plans. For example  
19 on this matter of the town houses. Parcels 1 and 2 were ad-  
20 jacent to Greenbelt homes property. They were fighting the  
21 townhouses on both of those parcels, because of the fact that  
22 they were going to build their own townhouses. As a matter of  
23 fact, they built theirs and Bresler hasn't built a single town-  
24 house on Parcels 1 and 2.

25 Then also, they were going to tell the school board

1 where to put the school. Now, the school board planned a  
2 high school and two other schools and they said, "We don't  
3 want the high school next door; we want you to build a high  
4 school on Parcel 15, which was remote and much more expensive.  
5 It was next to the Beltway, which was undesirable for a number  
6 of reasons, and even filed suit against the school board to  
7 prevent them from building the school on Parcels 1 and 2.

8 They were also saying to the Park and Planning Com-  
9 mission, which was the official, professional planning organi-  
10 zation for the entire county: "We don't want you to zone this  
11 property for townhouses." Now, they were trying to dictate,  
12 even though they had once owned and controlled this property,  
13 they were trying to dictate how this property was going to be  
14 developed. And this is

15 And this is the conflict. These were amateur plan-  
16 ners who were trying to tell the professionals what to do.

17 I think that in order to recognize the posture of  
18 this case, let me jump to the articles which start with the  
19 announcement that Mr. Bresler was going to run for Comptroller.  
20 I have not realized --

21 Q In order to escape the impact of the New York  
22 Times, don't you have to show that Mr. Bresler was neither a  
23 public official nor a public figure? The latter by virtue of  
24 the majority in Butts and Walker.

25 A Well, this -- well, let me say this: we have

1 felt that actually Butts was the dominating case, because we  
2 felt that he was not really a public official, at least as had  
3 been previously defined in other cases by this Court. He  
4 wouldn't come within the categories of St. Amant or a Commis-  
5 sioner as in the New York Times, or Deputy Sheriff, or any other  
6 of the categories. And this Court has specifically said --  
7 we're not saying how far we're going to go and we certainly  
8 won't go all the way down the line --

9 Q Well, what about General Walker in the --

10 A As a public figure?

11 Q Yes.

12 A Well, General Walker was a nationally-known  
13 figure. No question of this. The Court of Appeals again com-  
14 mented that they would not have found Bresler to be a public  
15 figure.

16 Now, I'd like to make this clear --

17 Q What was that?

18 A The Court of Appeals said that they would not  
19 have found Bresler to be either a public official or a public  
20 figure, but they said, arguendo, since the trial court had  
21 instructed the jury on the basis of both public official and  
22 public figure that the question was really academic.

23 But --

24 Q Well, are you arguing here that even if these  
25 instructions don't pass muster in the New York Times; even

1 if the evidence is insufficient to prove malice under New York  
2 Times, nevertheless they would be home free on a non-New York  
3 Times basis, because this isn't a New York Times case? Is that  
4 your position?

5 A I think that would be one aspect in view of  
6 the fact that there are --

7 Q Well, if it's not a New York Times case,  
8 actually that principle doesn't apply, is there anything that  
9 this Court has ever said of what the Federal Constitution does  
10 about the State's libel action?

11 If he's not either a public official or a public  
12 figure, why is the case here at all?

13 A Well, that's a question I asked, and I can only  
14 say this --

15 Q Well, are you asserting here that you don't  
16 concede here, I take it that this is a -- that this gentleman  
17 was either a public figure or a public official?

18 A He was a public figure in Greenbelt, because the  
19 newspaper made him one.

20 Q Well, do you concede that the New York Times  
21 rules apply to him?

22 A I don't think it would apply to this entire  
23 case, Mr. Justice, for this reason --

24 Q Well, it's only one case, one figure.

25 A Yes, sir. But, I'm saying that there are some

1 of these libels which had no application whatsoever as to his  
2 activities as a public figure. For example, the accusations  
3 that there had been suits filed against him for violation of  
4 county building standards. This was a private enterprise --  
5 this had nothing to do with the public issue which they were  
6 emphasizing: land and zoning.

7 And we think that we would be carrying the public figure  
8 concept too far --

9 Q Well, what about the skulduggery and blackmail?

10 A Again, we don't think that those would apply.  
11 We think --

12 Q Well, then you say that the New York Times has  
13 no relevance to this case; has no applicability to this case.  
14 If it doesn't apply to that, those statements about this gentle-  
15 man you are saying that he just isn't either a public figure or  
16 a public official.

17 A I don't think New York Times does apply. I  
18 think that if there is any application it might be --

19 Q Well, you certainly make no objection --

20 A No, sir.

21 Q -- if I read the instructions correctly. I  
22 think you were a party; weren't you? You tried this case.

23 A Yes, as a matter of fact --

24 Q And you were a party to those supplemental  
25 instructions which I mentioned to you earlier that borrowed in

1 terms from the New York Times series of cases. To instruct the  
2 jury, you not only did not object to it, but as I understand it,  
3 you participated in that; didn't you?

4 A Yes, sir, because we wanted the case to go --

5 Q Well, then how can you tell us now that this  
6 case doesn't involve the application of the New York Times?

7 A I was, in effect, assuming arguendo, because  
8 I wanted the instructions to the jury to be as broad as  
9 possible. I did not want any decision to rest on any narrow  
10 definition and the Court of Appeals --

11 Q But you do now, though, apparently? You would  
12 like to now, though.

13 A Only insofar as this Court itself has narrowed  
14 it. For example, in New York Times the Court said about eight  
15 times that this referred to the official conduct of a public  
16 official. That has nothing to do with the official conduct of  
17 Mr. Bresler. So, we say if New York Times applies, then per-  
18 haps Mr. Justice Goldberg's statement which says it doesn't  
19 apply to the private activities of a public official.

20 Q Well, now, you say he's a public figure in  
21 Greenbelt; he was at the time?

22 A Yes, sir; we couldn't --

23 Q And in what respect was he a public figure?

24 A The fact that they had made him one, as one who  
25 was participating -- well, I'd have to go back to 1934 --



1 Q Well, I would suppose that some of these alle-  
2 gations certainly related to whatever it was that made him a  
3 public figure, namely his activities in the construction busi-  
4 ness and his relationships with the County Board. That's what  
5 made him a public figure. Didn't these allegations relate to  
6 the conduct of his business with the county?

7 A No, sir. I think I should point out more  
8 clearly what made him a public figure. In 1964 on May the 7th  
9 when there was some dispute, some discussion of Council, the  
10 News Review published a report that the Council and the audience  
11 decided it made much more sense to stop attacking each other  
12 and concentrate on a common target: Bresler, who wasn't there,  
13 and that was when they decided that they had to have a scape-  
14 goat. because Bresler only owned a minority interest in these  
15 properties; he was not the major owner. There were others who  
16 owned more of an interest than he, but they had to have a  
17 name and his was the name that was selected.

18 This was followed up by the group sponsored by  
19 Greenbelt Homes. Mr. Swan, who was President, in which they  
20 announced on April 8, 1965 that the "Save Greenbelt Group,"  
21 gets its officers a name, CFPG and they formed this organization  
22 with Mr. Swan, with Mayor Smith, with Albert Herling, who made  
23 one of the blackmail accusations, with Mrs. Skolnik, and then  
24 on April 22nd they announced not only a citizen -- a citywide  
25 membership drive, but had an article, "City Battles Bresler on

1 Two Fronts." He was singled out by the News Review. And that  
2 was when they made the false allegation with the subtitle:  
3 "Court Suit," that the city and Bresler would be at odds.

4 Now, Bresler was not a defendant in that case, and  
5 they knew it. Even later, on May 6th after there had been a  
6 hearing and after the court had issued an order against Ivy  
7 Homes, Inc., in which Bresler had no interest whatsoever, this  
8 is what the News Review said: "At a hearing two weeks ago a  
9 court order was issued to the builders of Boxwood, another  
10 Bresler development." Bresler had nothing to do with that  
11 development to which the court ordered, but they wanted to  
12 feature his name. The exhibits show that they constantly  
13 featured his name.

14 This is like the man who pleaded for leniency on the  
15 ground that he was an orphan after he had shot his parents.  
16 They had made him a public figure and they were using this.  
17 They were using the public official defense, even though they  
18 knew there was no relation and it was never mentioned in the  
19 articles.

20 But, getting to the time when they announced: "Charles  
21 Bresler to Run for State Comptroller," on June 9, 1966 and this  
22 is where we get into the question of malice. Now, they claim  
23 that this lawsuit that was filed against Mr. Bresler was sub-  
24 sequent; it had nothing to do with it. But, taking the --

25 Q Is this the charge to which you refer to --

1           A       No; this was after the blackmail charge. But,  
2 after the blackmail charge there were other defamations.

3           Q       Well, which one do you consider was the worst?

4           A       We consider that the blackmail, skulduggery,  
5 false reports of lawsuits for violations of building standards,  
6 damaged him as a builder. Those are probably the most serious.  
7 There were other articles about possible corrupt influence on  
8 the school board, in which his name was mentioned in connection  
9 with the suit against the school board. He was not a party to  
10 the case, but they featured his name.

11                   It's hard to say which straw broke the camel's back.  
12 We felt there was an accumulation, but certainly --

13           Q       You are sure the accumulation broke his back?

14           A       It certainly made him the most hated man in  
15 Greenbelt. I don't think there would be any dispute about that.  
16 And we think that the cumulative effect of these articles, even  
17 those which were not necessarily libelous per se, which were  
18 intended to, and did, in fact, damage him.

19                   But, to start to indicate the process, they announced  
20 he was going to run for State Comptroller on June 9th and that's  
21 when they had the article which had several false statements.  
22 And, incidentally, in that article he was identified as a  
23 builder.

24           Q       As a what?

25           A       As a builder.

1 He was not mentioned as a Member of the House of  
2 Delegates, but as a developer and builder. It said he is  
3 currently faced with a series of legal actions instituted by  
4 the City of Greenbelt and referred to this suit which had been  
5 dismissed almost a year before, and also the false report that  
6 a number of homeowners in the Lakecrest and Boxwood developments  
7 started legal proceedings against him.

8 Q Well, if they had said in the article: "Builder  
9 and prominent political figure," or "builder and political  
10 leader," then you --

11 A Incidentally it did --

12 Q You seem to be making a point of their omission  
13 of his political affiliations. If they said, "Builder and  
14 political figure, builder and political leader, builder and  
15 Member of the House of Delegates," or what it is called there;  
16 would that make it all right?

17 A It would not be the governing factor, but I  
18 think it would, at least if they were saying, "We had the right  
19 to criticize a candidate for office, there certainly might be  
20 some reference to the fact that he does hold a political office.

21 If there is a question that he was qualified for that  
22 office and if there should be some question about it, but we  
23 don't contend this is a major premise.

24 We really want to point out that this was damaging, as  
25 we allege, to his reputation as a builder, his violation of

1 county building standards and nothing to do with any public  
2 issue.

3 Q Suppose the Governor, for example, coming to  
4 the end of a session of the Legislature, announces publicly a  
5 in a speech or something that if the Legislature doesn't do  
6 certain things he's going to call them back in a special  
7 session. And then some Member of the Legislature makes a state-  
8 ment to the effect that the Governor is engaging in blackmail  
9 against them. Do you think that's libelous, per se?

10 A No, sir; I think there is a difference, though.  
11 There had been articles published about the time. There still  
12 are; there was one in this morning, about bribery -- relating to  
13 bribery on zoning in Prince Georges -- this has been a burning  
14 issue in Prince Georges County and Virginia. The people in  
15 Greenbelt were very aware of this.

16 Now, to them, the fact that somebody was threatening  
17 to prevent the building of a school, I would think would be  
18 much more serious than just bribing some official with a couple  
19 hundred dollars.

20 The jury obviously felt that they intended to accuse  
21 him of blackmail. As a matter of fact, Mrs. Skolnik, when asked:  
22 "Did you believe that, or did you intend to accuse him of black-  
23 mail. Do you think that the statements were intended to accuse  
24 him of blackmail were proper?" And she said, "Yes, in the con-  
25 text of the meeting they were proper." There was no question

1 that they intended to defame him. These were not someone whom  
2 the News Review was reporting; these were their own people  
3 making these statements so the News Review could publish them.  
4 And it was intended to inflame the people to the point where  
5 they felt he had committed a crime.

6 I certainly think that anyone who would stop the  
7 building of a school would be verging on something criminal,  
8 particularly when they themselves in their brief, mentioned  
9 "coerced," and "threatened." This is what the general public  
10 feels is blackmail: coercion and threats.

11 I think the whole posture of the case, the fact that  
12 at that meeting they read an inflammatory statement to begin  
13 with by Mr. Schwan and then the statements were made indicating  
14 the whole purpose was to cause these inflammatory statements to  
15 be made so they could publish them.

16 They did publish them the following week and Mr.  
17 Herling, who is a member of that group made the blackmail state-  
18 ment.

19 Q Is it true that there was no evidence of  
20 pecuniary loss?

21 A No. We did not claim any pecuniary loss, be-  
22 cause how can we prove that people would not buy any of the  
23 houses because he wasn't building them according to county stan-  
24 dards. There is no way of proving that, Your Honor.

25 Q And the jury gave him \$5,000.

1           A       Yes, sir. They felt, I am sure, that there  
2 had been pecuniary loss, as well as --

3           Q       Well, obviously the jury didn't agree with you  
4 that he had been made out as the worst person in the county.

5           A       Well, I think they were conditioned by the  
6 statements made about this poor newspaper. I think there might  
7 have been a lot greater effect. My discussion with a couple of  
8 jurors later indicated that it could have been a good deal  
9 more. I think the jury --

10          Q       Your discussion with the jurors is not before  
11 us; I hope.

12          A       I'm sorry, sir. But, I think that they tried  
13 to be temperate; I think it indicated that they did reach what  
14 they felt was a verdict fair to both sides.

15                 We think that this whole pattern and I'm sorry that  
16 the exhibits are not in chronological order, indicated that they  
17 were leading up to -- as a matter of fact, the filing of the  
18 suit against Mr. Bresler, which was an absolutely privileged  
19 action, was filed shortly after the announcement of his candi-  
20 dacy and we felt that this whole pattern of announcements week  
21 after week, were the culmination of the suit and the misrepresen-  
22 tation as to the purpose of collecting the money for the suit  
23 is an indication that they had intended to damage him all the  
24 way through; that this was a continuing action.

25                 We think that, obviously the jury was convinced that

1 they intended to accuse him of blackmail and that this is what  
2 a layman, reading the article would have felt, particularly  
3 when there was no reason to publish the caption: "Blackmail,"  
4 unless they wanted to invite attention to the fact that he had  
5 been accused of blackmail; that he was a criminal.

6 I thank you.

7 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Chasanow.

8 Mr. Clark, you have nine minutes left.

9 REBUTTAL ARGUMENT BY ROGER A. CLARK, ESQ.

10 ON BEHALF OF PETITIONERS

11 MR. CLARK: Thank you, Mr. Chief Justice.

12 I would justlike to comment briefly on Justice  
13 White's question about the instructions. I think it's very  
14 clear from the instructions, Mr. Justice White, that the trial  
15 court singled out only the blackmail article. He referred to  
16 it three times in his instructions and did not refer to any of  
17 the other articles, which the only other article --

18 Q Except generally.

19 A Except generally. The only other article he --

20 Q He told the jury to consider all 45 exhibits.

21 A That's correct, but he --

22 Q -- and so we have no idea what the jury thought  
23 was --

24 A Well, I think that from reading the instructions  
25 though, Your Honor, you will see that the focus of the case, and



1 certainly the focus of the Court of Appeals' opinion is on the  
2 term "blackmail." And you get that clearly from reading the  
3 joint extract; you get that clearly from reading the opinion of  
4 the Court of Appeals.

5 Q So far as those two courts went, but it was the  
6 jury that decided the factual issues and awarded the damages  
7 and there is no way on earth to know what they might have felt  
8 was crucial.

9 A That's right, Your Honor, except that there are  
10 only -- there is only one other article in issue, about which  
11 there was evidence that it was factually inaccurate, and that's  
12 the one about the homeowners' proceedings, which is just really  
13 a piddling inaccuracy when you take it against the facts that  
14 they knew and the way they reported it.

15 This reference in the instructions to the blackmail,  
16 I think is helpful in answering the point that you made, Mr.  
17 Justice, about the explicit references to the New York Times at  
18 the end of this -- at the end of the court's instructions.

19 The court instructed the jury that going to the factor  
20 of truth there is no contention in this case it is conceded by  
21 the defendants that these allegations were not true; that  
22 Bresler committed the crime of blackmail, and that Bresler was  
23 guilty of blackmail.

24 So, in the background of that reference when the court  
25 after it instructed the jury with malice, ill-will, spite or

1 hostility --

2 Q Well, now on that, the jury, as I read this  
3 record, came back twice. On the second occasion the judge --  
4 is that right?

5 A Essentially right; the judge instructed after  
6 the lunch break. The jury hadn't been out.

7 Q I see. But when they came back, while he  
8 didn't say in so many words; "Forget everything I said to you  
9 about spite, ill-will and so forth, the law of the case is the  
10 New York Times rule"and as I read it, what he did was read them  
11 the actual language out of the opinions in Times, Garrison and  
12 Rosenblatt.

13 A That's right.

14 Q Then did the jury then have the case on the  
15 basis of "Forget everything I said to you on spite, ill-will?"

16 A If he had said that, I think that would have  
17 cured substantially much of the error that had taken place, but  
18 he didn't simply give the New York Times instructions. This is  
19 why I get back to this bit about "we conceded that the allega-  
20 tions of blackmail were false," because when he gets into the  
21 New York Times instruction at the end he prefaces his comment  
22 with: "There is no contention here that the statements regarding  
23 blackmail were true." So, he is really instructing the jury  
24 that we have conceded the statements were false. That would  
25 meet the New York Times test and in fact, underwrites the

1 instructions completely.

2 Q Oh, no; no. Conceding that the allegations  
3 were false doesn't concede any knowledge of falsity at the time.

4 A Well, the fact that we did not contend that  
5 the articles were true meant that we conceded -- that's what  
6 the instructions were -- that we conceded that the allegations  
7 were false.

8 Now, if we --

9 Q Well, you conceded that if they were given the  
10 meaning of charging --

11 A If we conceded, yes that's exactly right.  
12 That's what the court, I believe, led the jury to believe that  
13 we had conceded it.

14 Q Well, but the judge, also in defining libel,  
15 however, if the jury -- if it was left to the jury to determine  
16 whether or not the charges of blackmail the way it was used was  
17 charged a crime.

18 A That's right, and then he further instructed --

19 Q And the jury could not find for the plaintiff  
20 unless they believed that the way blackmail was used was meant  
21 to charge a crime.

22 A Charge the crime; charge the crime.

23 Q Yes. They really had to believe that before  
24 they could find for the plaintiff.

25 A That's right, but --

1 Q Under these instructions.

2 A -- but then he gives them further instructions  
3 that we conceded that the allegations were not true that  
4 Bresler was guilty of blackmail.

5 Q Well, you do; don't you?

6 A No. I don't concede the --

7 Q Well, you do if -- let's assume that the judge  
8 ruled as a matter of law that these words charged a crime. You  
9 disagree with that, but let's assume that he ruled that way.  
10 And then he asks: "Do you concede that so-construed those words  
11 were false?" You would concede it.

12 A I would concede that, but I wouldn't concede  
13 the allegations in the article are false. I think that was  
14 misleading to the jury.

15 What's lacking here, obviously is an instruction, a  
16 clear instruction that the defendants not only charges, but the  
17 knew that they were charging; they intended to charge this  
18 strange and really ludicrous meaning of -- they knew it was  
19 false.

20 Q Well, may I ask this: I gather from what you  
21 said to me earlier, after the New York Times charge was given  
22 the correct one, that Mr. Clark -- that was trial counsel, I  
23 gather --

24 A That's right.

25 Q -- said that he still objected in view of the

1 prior instructions which had gone before this and in which  
2 malice was averted to as involving hostility, that this should  
3 be made clear to the jury that evidence of evil motive, ill-  
4 will, hostility, does not constitute malice within the defini-  
5 tion of the constitution.

6 I gather even had that been given you would still be  
7 here?

8 A Yes, I certainly would still be here, because  
9 I don't think the evidence is sufficient to allow a jury to  
10 make that finding. I think for a jury to find that this article  
11 charges the crime of blackmail --

12 Q Well, do you think there is any issue whether  
13 this is a case involving the Times test?

14 A I think that's very clear that this --

15 Q That he is a public figure?

16 A That he is a public figure; not only concede  
17 that he was a public figure, but that there was previous wide-  
18 spread publicity in the Washington Post and metropolitan papers  
19 about the magnitude of importance of his duties there: "vast  
20 private developments planned in 25-year-old community," logging  
21 Mr. Bresler's activities and the scope and magnitude of those  
22 activities.

23 Q Well, was any -- did Mr. Bresler take the  
24 position at trial at any time that he was not a public figure?

25 A No. In fact his counsel conceded in his

1 opening statement in the article -- the blackmail articles went  
2 to a public issue, but he raised the issue with the City Council  
3 by making a proposal to them.

4 Q Well, apparently the Maryland Court of Appeals  
5 had some question about it, because it did say that the Times  
6 case was more favorable to your client than it was entitled to  
7 on the record.

8 A We don't think so.

9 Q That's what the Court of Appeals said; wasn't  
10 it?

11 A That's what the Court of Appeals said, and I  
12 don't think there is any substance; I think they were looking  
13 to the fact that his public official capacity only --

14 Q Well, in any event, you concede we have to be  
15 satisfied he's at least a public figure before we have any  
16 question before us at all?

17 A That's right. And I think that the citizens of  
18 Greenbelt had as much interest in this zoning proposal, which  
19 affected/a large portion of their community was going to be  
20 developed. As much interest, certainly, as the general public  
21 had in Wally Butts's college football experiences.

22 Q Well, the court did end up saying that you can  
23 only find for the plaintiff if you find knowing falsity or  
24 reckless disregard; you can only find for the plaintiff if you  
25 find that.

1           A       Prefaced by the reference to the fact that we  
2       conceded the statements were false.

3           Q       But he ended up by saying that it wouldn't be  
4       enough to find hostility.

5           A       In a very lengthy and confused instruction on --

6           Q       That's right.

7           A       -- that you could recover on other bases.

8           The other thing, quickly, is the "skulduggery"  
9       comment. The skulduggery comment is rather a normal theory.

10          There is no -- it doesn't refer to Bresler. There  
11       is no indication that the condensation -- the skulduggery word  
12       is a condensation that was inaccurate. There is no indication  
13       that the underlying comments were inaccurate. All it was was  
14       criticism of the school board in delaying the condemnation  
15       action.

16          Q       Do you think "skulduggery" is a libelous  
17       word? Now, let's just assume that you say that so-and-so's  
18       guilty of skulduggery.

19          A       Well, I don't think it's certainly a very  
20       serious --

21          Q       Well, I know; but is it or isn't it?

22          A       I would have to say "no." Certainly when its  
23       directed to a public body, an impersonal reference to an offi-  
24       cial action of a public body, as we have in the Rosenblatt case.  
25       I would have to say --

1 Q Well, are newspapers completely free to charge  
2 anybody it wants to, private citizen or not, with skulduggery?

3 A Well, I don't have to reach that in this case,  
4 Mr. Justice, because they didn't charge a private individual;  
5 they charged the school board.

6 Q I know, but that wouldn't make it as far as its  
7 being libelous is concerned -- it wouldn't make any difference  
8 whether it's a private citizen or a public figure as to whether  
9 or not it satisfied the definition of libel.

10 A In the context of what was involved -- in other  
11 words, the postponement of a condemnation action by an official  
12 governmental body, I don't believe that that arises to the  
13 stature of a libelous statement under the constitution.

14 Q Is it your point that this is a group libel, in  
15 effect, by addressing the term "skulduggery" to the conduct of  
16 the entire board and not any one person?

17 A That certainly is my point and also there is  
18 just no showing it's false.

19 Q Before you can show falsity you would have to  
20 have a pretty firm definition of what skulduggery is; wouldn't  
21 you? That might be hard to come by.

22 A Thank you, Your Honor.

23 MR. CHIEF JUSTICE BURGER: Thank you for your sub-  
24 mission. The case is submitted.

25 (Whereupon, at 11:16 o'clock a.m., the argument in the  
above-entitled case was concluded)