

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

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Pt. 1

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Place Washington, D. C.

Date February 24 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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ORAL ARGUMENT OF:

P A G E

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

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

GREENBELT COOPERATIVE PUBLISHING)
ASSOCIATION, INC., ET AL.,)
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Petitioners)
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vs))
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CHARLES S. BRESLER,)
))
Respondent)
))

No. 413

The above-entitled matter came on for argument at
2:05 o'clock p.m. on Monday, February 24, 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.
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Attorney for Petitioners

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Greenbelt, Maryland 20770
Attorney for Respondent

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: Number 413, Greenbelt
3 Cooperative Publishing against Bresler.

4 Mr. Clark, you may proceed whenever you are ready.

5 ORAL ARGUMENT BY ROGER A. CLARK, ESQ.,

6 ON BEHALF OF PETITIONERS

7 MR. CLARK: Mr. Chief Justice, and may it please the
8 Court: This is an action for alleged libel.

9 Petitioners are a small community newspaper, the
10 Greenbelt News Review, and its President.

11 The Respondent Bresler is a major builder-developer
12 in Greenbelt. His building activities there previously re-
13 ceived wide publicity as to their importance and magnitude to
14 the community.

15 Mr. Bresler had numerous dealings with the city
16 counsel and other government agencies in an effort to get
17 their approval for his zoning plans.

18 And his counsel conceded in his opening statement that
19 counsel was a public figure in Greenbelt. Also, during this
20 period he was a member of the State Legislature and later a
21 candidate for Comptroller of the State.

22 No actual damages were shown or claimed. A jury
23 verdict was entered for \$5,000 compensatory damages, \$12,500
24 punitive damages, which was affirmed by the Court of Appeals.

25 Two of the three articles which the Court of Appeals

?????
ar end
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ape

1 relies upon to support this judgment are accurate reports of
2 public debate of two City Council meetings -- two Greenbelt
3 City Council meetings, regarding Bresler's proposal for the
4 city in which he tried to press the city into supporting his
5 request for higher density zoning for a large tract of land
6 in the center of the city.

7 He did this by saying that he would agree to sell
8 another tract which he owned in the city, on which the school
9 board wanted to build a school, which the city desired. He
10 would sell that only if the city agreed to his zoning request.
11 Otherwise, he would insist on lengthy condemnation proceedings
12 which would delay construction of the high school.

13 Now, the first of the two articles relied upon by the
14 Court of Appeals, is in the joing appendix at page 211 and if
15 I may, since it's so critical to my argument I would like to
16 go through that article just the key points, shortly.

17 MR. CHIEF JUSTICE BURGER: Before you do, Mr. Clark,
18 I'll just remind you and I dont want to inhibit you about
19 reading it, but you're not going to ask us to decide whether
20 the material should have justified the verdict, I take it,
21 but rather your obligation here is to point out what error
22 there was in submitting the case to the jury; isn't that
23 primarily it?

24 A That's correct Your Honor, and my argument is
25 primarily that there is insufficient evidence as a matter of

1 law to let this case go to a jury --

2 Q In the first place.

3 A -- in the first place, and therefore the court
4 erred in denying my motions for a directed verdict and for
5 judgment N.O.V.

6 Q You rested on the record, rather than --

7 A I am resting on the record; yes, sir.

8 However, the article that forms the basis of this
9 suit; the article is entitled, "School Site Stirs up Council,
10 Rezoning Deal Offer Debated."

11 The article makes -- the article is now discussing a
12 proposal for the City Council to debate on that proposal. In
13 the first paragraph of the article: "Delay in construction of
14 a new Greebelt high school is the lever by which a local
15 developer is pressuring the city to endorse his bid for higher
16 density rezoning. So, citizens were told at a crowded meeting
17 of the City Council.

18 The next two paragraphs explain how the school board
19 previously had been trying to get the land.

20 At the top of the next page in the fourth paragraph in
21 the article, the proposal -- Bresler's proposal to the City
22 Council is fully and accurately set forth. It is only at that
23 point, after it is clearly established in the article, that the
24 conduct being criticized is the proposal. The proposal is set
25 forth clearly; the fact that it was publicly made is set forth,

1 and the fact that what was involved here was merely a threat
2 to use his legal right to delay the condemnation actions; the
3 right of any landowner to insist upon a condemnation pro-
4 ceedings.

5 It is only at this point that the article begins to
6 describe the very hostile public reaction at the City Council
7 meetings on this proposal. And the sixth paragraph accurately
8 reports that a number of people at the meeting accurately --
9 excuse me -- the article accurately reports that a number of
10 people at the meeting characterized this proposal as an attempt
11 to blackmail the city.

12 The sixth paragraph says: "It seems that this is a
13 slight case of blackmail," commented Mrs. Marjorie Bergemann,
14 and the word was echoed by many speakers from the audience.

15 Immediately after the reference to Mrs. Bergemann, a
16 City Councilman is quoted as saying that it is not blackmail,
17 and he preferred to call it just a two-way negotiation.

18 Then the article goes on and lists other criticisms
19 and the following comment demonstrates exactly what the people
20 at the Council meeting objected to. He said, "Everybody knows
21 there is a need for a school. The developer knows there is a
22 need and says, 'we'll meet your need if you meet our need.'"

23 That's what the people were referring to when they
24 were referring to this article as blackmail.

25 The second article is much the same thing. It's the

1 report of a second City Council meeting at which there was
2 further debate on the same proposal and the City Council
3 finally voted 4-1 to reject that. In that article another
4 participant is quoted as saying, "Fight Bresler's Blackmail,"
5 in an attempt to tell the City to vote the proposal down.
6 After that --

7 Q Where is that in the record?

8 A That would be on page 216. And right after
9 that another participant in the debate is quoted as saying
10 that: "This isn't blackmail; but the legitimate advance of
11 Mr. Bresler's right to advance his rights to develop this
12 land."

13 Now, the decision below rests on the proposition --
14 the incredible proposition, I believe, that these articles
15 charged Bresler with the crime of blackmail and that
16 petitioners knew they were charging him with the crime of
17 blackmail. But there was no evidence that anybody interpreted
18 this article as charging him with blackmail. Bresler could
19 identify no one who read the articles that way. He couldn't
20 explain why he, himself, claimed that they charged him with the
21 crime of blackmail. He couldn't explain what conduct he was
22 supposed to have been charged with that would constitute the
23 crime of blackmail.

24 Nor was he able to explain why he ignored the articles
25 for nine months, until he brought this \$2 million libel suit,

1 at a time when he was in the midst of his campaign for State
2 Comptroller and the News Review was accurately criticizing his
3 disregard of certain land covenants and his misrepresentations
4 to the City Council in connection therewith, on another
5 matter.

6 Q Am I wrong, that the jury did not and would not
7 have found for the plaintiff here, unless it believed or
8 understood the paper to charge criminal blackmail?

9 A I don't think so, Your Honor, for the reasons
10 stated in my brief. The instructions permitted the jury to
11 allow recovery if they found that this was an intemperate or
12 excessive statement and it was motivated by a sense of spite
13 or hostility, that report.

14 So, I don't think the jury --

15 Q You mean that's the way libel is defined in
16 Maryland?

17 A Libel -- this was the instruction that was
18 given to the jury that you could find on the Maryland Rule of
19 Fair Conduct.

20 Q They first had to find that there was libel,
21 a libelous statement made, didn't they?

22 A They first had to find the libelous statement.

23 Q And what was that libelous statement do you think
24 it found? They couldn't have found that it was a libelous
25 statement unless they thought it was criminal blackmail that

1 was charged.

2 A Well, I don't think, Your Honor, that the
3 instructions that were given -- the instructions were rather
4 lengthy and somewhat confusing, but I think the jury could
5 very well have found, from the instructions given that the
6 defendant could recover if they found that the statement was
7 so interpreted or assessed so as to indicate that it could
8 only have been activated by actual malice.

9 Q Well, then the jury was disregarding its instruc-
10 tions, I suppose? I mean, it first had to find there was a
11 libelous statement made, libel per se; right?

12 A Under the instructions of the court it had to
13 find a libelous statement. However, when you --

14 Q Did it find it? I guess it did find it.

15 A Well, my point is that there is insufficient
16 evidence there. If you read the article -- everybody who reads
17 the article to that point, it is clear to them that that con-
18 duct is involved here, that that conduct has no relationship to
19 the crime of blackmail.

20 If the jury found that, and I don't believe they did
21 under the instructions -- if the jury found it, my position
22 here would be that there is insufficient evidence from which
23 they could make that judgment.

24 Moreover, there is no evidence that the petitioners
25 intended this strange meaning. The only evidence relied upon

1 by the court was petitioner's testimony that the word "black-
2 mail" in another context could charge the commission of a
3 crime. And, that there was nothing at the meeting which
4 indicated that Bresler committed a crime of blackmail.

5 The Court of Appeals concluded on that testimony
6 alone, which assumed that the Petitioners intended to charge a
7 crime. There is no evidence; they just assumed that. But,
8 it would be difficult to conceive of a case in which there was
9 more convincing evidence that Appellants had knowledge of the
10 falsity of the charge or in effect, entertained serious doubts.

11 And this holding, I submit, is nothing less than a
12 mockery of the New York Times Rule. You can't establish
13 falsity, much less know^d falsity by taking a word out of con-
14 text and ascribing to it a meaning that is wholly different
15 from that which its context dictates.

16 No one, I submit, reasonably can conclude from this
17 article that the petitioners intended to charge Mr. Bresler
18 with the crime of blackmail, which was defined to the jury in
19 the Court's instructions as the extortion of money by threats
20 of criminal prosecution or disclosed embarrassment -- threats
21 of disclosure.

22 The article, by making it clear what kind of conduct
23 Bresler was being criticized, what that conduct was, that it
24 was publicly made, the proposal publicly made to the city,
25 completely negated any reasonable finding that the crime of

1 blackmail was charged or that the petitioners intended to
2 charge it.

3 Q Are you saying that read as a whole, the
4 articles say, in effect, that Bresler was engaging in high-
5 pressure tactics to force the city to do something he wanted
6 done?

7 A That's exactly right. And the use of the word
8 "blackmail" to characterize that is no more strong or intem-
9 perate than you see every day in major metropolitan newspapers
10 responsible papers. I have collected those articles in
11 Appendix A to our brief. You will see that both the Post and
12 the Star reported Channing Phillips' characterizations of
13 Congressman Natcher's delaying the subway funds on the con-
14 struction of the Three Sisters' Bridge as blackmail.

15 The Post characterized editorially Senator Fulbright's
16 attempt to force a change in Vietnam policy by stalling legis-
17 lation, as nothing less than blackmail.

18 These strong expressions are the essence of spirited
19 debate; they are the essence of a robust, uninhibited, wide-
20 open debate which this Court has sought to protect in the
21 Sullivan case and all the cases that have followed from it.

22 If the press must run the risk that they will be
23 taken out of context and given an ominous meaning to support
24 subatantial libel judgment, then the debate will clearly be
25 inhibited. And I think the Respondent recognizes the weakness

1 of this central holding of the court by attempting to shift
2 the focus to other articles that were in issue.

3 Q How much was the verdict?

4 A \$5,000 compensatory damages, and \$12,500
5 punitive damages, which have a far greater impact on this
6 small paper than the \$500,000 judgments against the New York
7 Times in the Sullivan case.

8 As I say --

9 Q What was the legal basis for the punitive
10 damages?

11 A Well, of course, the jury verdict does not make
12 that --

13 Q The jury verdict; what was the legal basis upon
14 which they were charged that they had a right to give punitive
15 damages?

16 A They were given the standard instructions on
17 punitive damages and if they found that the defendant acted
18 with spite or hostility that they would be allowed to re-
19 cover punitive damages.

20 The other article in issue which the court relies on
21 to support this verdict, is an article entitled: "Charles
22 Bresler to run for State Controller," and it was to be on the
23 eve of his announcement as a candidate for State Controller,
24 it lists his dealings in the community. And there is a state-
25 ment in there that a number of homeowners had started legal

1 proceedings against him for failure to make construction cor-
2 rections in accordance with county standards.

3 Now, the basis for this article is clearly set forth
4 in the record. Fifteen to 20 homeowners, at a public meeting
5 told the News Review's reporter, after a public meeting, told
6 the News reporter that they had gone to their lawyers, that
7 they had filed complaints with county officials regarding
8 their homes which the reporter interpreted as starting legal
9 proceedings.

10 Now, many of these people were personally known to
11 the reporter, Mrs. Skolnik, or she recognized them as
12 residents of the community. She had also previously heard
13 similar complaints from other people in the developments.

14 All of the homeowners with whom she talked, identi-
15 fied Bresler as the builder with whom they were dealing.
16 Bresler, himself, conceded that he received a number of com-
17 plaints and he responded to those complaints. Moreover, it
18 subsequently turned out that one suit had been filed and two
19 of the suits were subsequently filed against -- three suits
20 were subsequently filed against corporations in which he was
21 a principal.

22 Now, the claim of falsity here is very narrow; the
23 claim of falsity here, that by saying "started legal proceed-
24 ings," that statement is false, because no suits had been
25 filed against him personally.

1 Now, the gist of the article, of course, was that a
2 substantial number of homeowners in the community were com-
3 plaining about defects in his homes. That is true. The trial
4 court paid little attention to this article. He mentioned,
5 in denying a motion for a directed verdict that this article
6 didn't bother him.

7 The Court of Appeals, however, said that the failure
8 by the reporter to check court records or to call Bresler
9 before reporting this information, was sufficient evidence to
10 constitute a finding of "recklessness."

11 Q Now, specifically, which information was that?

12 A The information that the court said that Mrs.
13 Skolnik should have checked court records to determine whether
14 lawsuits had actually be filed against Bresler personally.
15 And this finding is completely at odds with the holdings of
16 this Court in Garrison and St. Amant, but there must be some
17 evidence that the publisher was aware of a possible inaccuracy
18 or probable inaccuracy.

19 There is no finding or evidence here that petitioners
20 had any doubt of the accuracy of this report, since they had
21 gotten their information from a number of homeowners who were
22 apparently responsible, who were, presumably, speaking from
23 firsthand knowledge and who had, in fact, complained to
24 Bresler and in fact, complained to their lawyers, they had no
25 reason to doubt this information or to investigate further.

1 Q What was Bresler's connection with the company,
2 if any?

3 A Well, Bresler was a part-owner and at the trial
4 he denied that this point in time he was active in the cor-
5 poration. However, the contemporaneous affidavit which he
6 filed in another case, completely unrelated case, filed right
7 at the same time, said he was the Vice President of the Cor-
8 poration, in charge of all sales.

9 And the critical thing, from the standpoint of the
10 reporters was that Bresler was the one who dealt with all of
11 the complaining homeowners. Homeowners, naturally, person-
12 alize the builder. They don't think it's X corporation or
13 Y corporation. They think about it in terms of Zeckendorff or
14 Yeonas or whoever the builder happens to be, they tend to
15 personalize him. And they were talking about Bresler and
16 Bresler is the one who responded to their complaints.

17 Q What were they accusing him of?

18 A They were saying that he had failed to make
19 corrections in their homes in accordance with county standards.
20 And they were claiming that he had failed to correct defi-
21 ciencies in their homes that his development built.

22 Q Correct what?

23 A Deficiencies in the homes.

24 Q As an officer of the company?

25 A Well, they were equating him with the company,

1 in the development. He was the -- to them Bresler was the
2 builder. He was the one that acted for the builders. It was
3 his corporation that was failing to perform, so they were
4 equating Bresler with his corporation.

5 Q And exactly what did they accuse him of, did
6 you say?

7 A Of failure to make corrections; to bring their
8 houses up to snuff.

9 Q Is that all?

10 A That's all.

11 Well, the Court, responding to Mr. Justice White's
12 observation, I do find that the instructions here are clearly
13 wrong. Throughout the instructions the Court repeatedly
14 instructed that the defendant could recover if he showed
15 actual malice, which was defined as "spite, hostility, or
16 deliberate intention to harm."

17 Now, because of the instructions, the court did give
18 an incomplete instruction on the New York Times Rule, but he
19 failed to instruct the jury that spite, hostility and ill-will
20 as he had repeatedly defined it before, was not sufficient to
21 permit recovery. Also the Court refused to rule out mere
22 negligence as proof of recklessness.

23 I don't emphasize here these erroneous instructions,
24 because, as I pointed out, in the three articles which
25 the court relied are clearly insufficient as a matter of law

1 to permit recover under the New York Times Rule.

2 Q Is it your position that even if the instruc-
3 tions were correct --

4 A You could not recover. My position also is
5 that this unfounded litigation is such, has been such a strain
6 on this small newspaper that if we -- if you simply reverse on
7 the basis of the instructions, which are clearly erroneous,
8 as there will be a denial of the First Amendment protection.

9 Therefore, I ask the Court to review the record and
10 determine that it does not contain evidence sufficient to
11 support a verdict on the constitution.

12 Thank you.

13 MR. CHIEF JUSTICE BURGER: I observe that you've
14 only got two minutes left of the day. I think we won't ask
15 you to split your argument in such a fragment, so we will
16 adjourn for today.

17 (Whereupon, at 2:30 o'clock p.m. the argument in the
18 above-entitled matter was recessed until 10:00 o'clock a.m.
19 on Wednesday, February 25, 1970.