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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 150.

THE ASSOCIATED PRESS,
Petitioner,

vs.

EDWIN A. WALKER,
Respondent.

On Writ of Certiorari to the Court of Civil Appeals of Texas.

PETITION FOR REHEARING.

Respondent, Edwin A. Walker, respectfully petitions the Court for a rehearing of the judgment and decision entered in this cause on June 12, 1967; and, in support thereof respectfully shows to the Court:

GROUNDS FOR REHEARING.

1. The Court overlooked the facts that the dispatches involved in this case were dated October 2 and 3 respectively, **48 and 72 hours** after the alleged Walker-led riot

of Sunday evening, September 30, 1962 (Associated Press Brief p. 7 and R. 11). The opinion of the Court incorrectly states (p. 26) that,

> "In contrast to the **Butts** article, the dispatch which concerns us in **Walker** was news which required immediate dissemination."

Later in the same paragraph the Court said, "Considering the necessity for rapid dissemination, . . ." There was no necessity for rapid dissemination 48 and 72 hours after the riot took place. Full descriptions had been given by radio, television and press during the riot on September 30, and the riot was no longer the "hot news" this Court thought it was when the libels were published.

2. The Court said that "the trial court found the evidence insufficient to support more than a finding of even ordinary negligence" (Opinion p. 25). This Court overlooked the specific findings of the jury, not set aside or disturbed by the Texas courts, that the AP dispatches were not "substantially true", were not "fair comment" or "the honest opinion of the writer", and were not "made in good faith" (R. 59-60). Such findings clearly constitute more than ordinary negligence. Whether each article was published "with knowledge that it was false or with reckless disregard of whether it was false or not" (the New York Times rule) must ultimately be determined so that the parties have a full day in court.

3. The opinion of the Court (p. 26) seems to set up a new Constitutional standard for libel cases, never before considered, namely "severe departure from accepted publishing standards." If so, then the parties should be given an opportunity to prove in a jury trial what "accepted publishing standards" are and the jury to decide if the AP departed from these standards.

4. In referring to Van Savell as "a correspondent who . . . gave every indication of being trustworthy and com-

petent'' (Opinion p. 26), the Court overlooked the jury findings to the contrary and the rule of Respondeat Superior.

5. The contradictory results reached in the Butts and Walker cases constitute a denial of Equal Justice and Due Process of Law and result from ''review [ing] the factual questions in cases decided by juries—''which has been called ''a flat violation of the Seventh Amendment.''

Ground One.

The Dispatches Libelling Walker Were Not ''Hot News'' Which Required Immediate Dissemination.

The attention of this Court is respectfully called to the dates of the defamatory AP articles, namely October 2 and 3, 1962. These were two and three days respectively after veteran reporter Al Kuettner filed a United Press dispatch saying (R. 831):

> ''During a lull in the rioting General Edwin A. Walker mounted a Confederate statue on the campus and begged the students to cease their violence.''

In these days of instantaneous radio, telephone and television communications, the ''hot news'' concept should not apply to AP stories dealing with a subject which has been cold news for 25 to 50 hours.

Ground Two.

The Trial Court Did Not Find ''the Evidence Insufficient to Support More Than a Finding of Even Ordinary Negligence,'' as Alleged by the Supreme Court.

The Court misconstrued the effect of the trial court's finding that ''there is not **actual** malice in this case (R.

72, emphasis added). This is not equivalent to a finding of only ordinary negligence. There may be present here a "reckless disregard of whether it was false or not" which under **New York Times v. Sullivan,** 376 U. S. 254, 279-280 permits recovery for libel.

The trial court also said there was lacking "that **entire want of care** which would amount to a **conscious indifference** to the rights of plaintiff," as required for punitive damages under Texas law. (R. 70, emphasis not added.) This, likewise, is not a finding of only ordinary negligence.

It would seem that, in fairness, the trial court, who presided over the actual trial, observed the witnesses, and was most familiar with the nature and extent of the evidence, should be given the responsibility, under directions from this Honorable Court, to pass upon the issue, in a further proceeding in the nature of Motion for Judgment Notwithstanding the Verdict, as to whether the evidence supported the jury's finding that Savell's report was false, not fair comment, and not made in good faith, and whether this was "knowingly false" or "in reckless disregard of whether it was false or not" under **New York Times v. Sullivan.**

It seems unfair for this Honorable Court, remote from the actual trial, to reach conclusions on actual damages based on comments of the trial court in connection with punitive damages.

By his action in connection with the punitive damages issue, the trial judge demonstrated a responsibility and sense of justice indicating that he properly could be trusted with this judicial responsibility.

Ground Three.

The Opinion of This Honorable Court Is Wrong, on a Question of Fact, in Saying That "Nothing in This Series of Events Gives the Slightest Hint of a Severe Departure From Accepted Publishing Standards."

The Associated Press had two to three days and vast resources, far more than the Saturday Evening Post whom this Court holds responsible, for checking the accuracy of its obviously defamatory articles about the Plaintiff. It had its other reporters and photographer on the spot, namely Lebercon, Scott, Perkins, Hall and Bourdier, none of whom reported that Walker led a charge. It had access to the hundreds of pictures taken, none of which showed Walker leading a charge. It had access to the United Press news story which said, "General Edwin A. Walker mounted a Confederate statute on the campus and begged the students to cease their violence" (R. 831, 1174). It had 48 hours to interview the Federal marshals, State highway police and other participants to see if Walker led a charge. Instead the Associated Press elected to rely solely upon the report of its 21-year-old newsman, Van Savell, **who was an employee of Associated Press** (R. 721-722).

His false report was preceded by this AP "Editor's Note": "Here is the story of Van Savell, 21, Associated Press **newsman,** who was **on the scene and saw what happened"** (R. 2).

Savell's report states: **"Throughout this time, I was less than six feet from Walker"** (R. 2-3, AP Brief 7-9).

Without bringing Savell to court to support the truthfulness of his report, Associated Press elected to stand upon his deposition, which had been taken by Plaintiff, rather than risk his confrontation of the jury.

The result was a verdict, upon special findings that Savell's report was: (1) Not "substantially true," (2) Was not "fair comment" or "the honest opinion of the writer", (3) Was not "made in good faith in reference to a matter in which the Defendant had a duty to report" (R. 59-60).

This verdict was returned by the jury after hearing and observing, with the composite wisdom of twelve individual citizens, the testimony and demeanor of numerous witnesses, including Walker himself, under extensive cross-examination. As stated in **Norton Co. v. Department of Revenue of Illinois**, 340 U. S. 534, 538 (1951), and cases there cited:

> "Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence."

The opinion of this Honorable Court takes no issue with the specific findings by the jury of false reporting, lack of good faith, and lack of honest opinion concerning the articles written by the Associated Press; and under the record, no Appellate Court could fairly or logically reverse these solemn findings by the jury.

The question in this appeal is whether the law should impose upon Walker or upon Associated Press the loss resulting from the wrong committed by Savell, an agent and employee of Associated Press, whose work product was adopted and published for profit by Associated Press.

It is recognized as the end of Justice that "No One Shall Suffer Wrong." Walker has suffered grievous wrong by the Associated Press reports which have permanently branded him as a criminal and lunatic, and

which caused his six-day imprisonment in a Federal Prison for insane criminals.

If any credence whatever is to be given to the jury's answers to interrogatories, Van Savell was an eyewitness but his report was false, not made in good faith, and did not even represent his honest opinion. When such findings are not challenged by any of the courts, how can the AP publications about Walker be less than a "severe departure from accepted publishing standards"?

Ground Four.

In Describing AP Reporter Savell as "Trustworthy and Competent", the Court Overlooked the Jury's Findings to the Contrary and the Rule of Respondeat Superior.

No corporate employer may escape liability for misconduct of its employee by saying the employee appeared trustworthy and competent. Under Respondeat Superior, the employer is responsible for the acts of its employee done in course of his employment. The AP stories sued on by Walker referred to their author as an "Associated Press newsman who was on the scene and saw what happened" (R. 2). He was not a "correspondent" in the sense of being an independent contractor. He was part of the AP organization.

The jury's specific findings that the AP statements about Walker, written by AP reporter Savell, were not "substantially true", were not "made in good faith", and did not represent "the honest opinion of the writer" (R. 59-60), have never been set aside by any court. They should not be disregarded because of alleged prior trustworthiness, as to which the record is silent.

Unlike the first bite given to dogs, the law has not yet given reporters, or their employers, a first libel without liability.

The Court disposes of Walker's case as a **question of fact,** in the following language:

> "Considering the necessity for rapid dissemination, nothing in this series of events gives the slightest hint of a severe departure from accepted publishing standards.[1] We therefore conclude that General Walker should not be entitled to damages from the Associated Press."

As pointed out by Mr. Justice Black, the Court has looked at the facts in both cases, "as though it were a jury" . . . has reviewed "factual questions in cases decided by juries—a review which is a flat violation of the Seventh Amendment", which provides as follows:

> "IN SUITS AT COMMON LAW . . . THE RIGHT OF TRIAL BY JURY SHALL BE PRESERVED, AND NO FACT TRIED BY A JURY SHALL BE OTHERWISE RE-EXAMINED IN ANY COURT OF THE UNITED STATES THAN ACCORDING TO THE RULES OF THE COMMON LAW."

There is no right deeper rooted in traditions of anglo-saxon jurisprudence than the right of Trial by Jury, which has provided a system for determination of facts by fellow citizens of the litigants, charged by oath to perform a vital duty, epitomized by the blind-fold upon our

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[1] The attention of the Court is respectfully directed to the fact that the "accepted publishing standards" are apparently based solely upon the concept that Associated Press was legally free to evaluate and publish Savell's false report, as though he had been an independent correspondent, who was providing "hot news" to Associated Press. If the report originating from Savell, **as an employee of Associated Press** did not even represent his "honest opinion", as found by the jury, it would seem, in fairness, that all of the standards of **New York Times** as a question of fact, as well as Law, should hold Associated Press responsible for a report knowingly false and in reckless disregard for the truth.

symbolic Goddess of Justice. To eliminate from the procedure, as far as possible, frailties of human nature, the law has provided safeguards, in addition to the oath, as follows:

1) The parties are allowed challenges, peremptory and for cause.

2) The jurors are required to observe, in open court, the appearance and demeanor of witnesses, so that their candor, fairness, emotions and integrity may be evaluated in the jury's search for TRUTH.

The dedicated framers of our Constitution must have recognized that statutory appellate procedures were designed and suitable only for review of cases for errors of law by tribunals that were not designed to try fact questions, since they were not subject to challenge, and would have no opportunity to confront the witnesses.

This Honorable Court has seen fit to re-examine facts tried by juries in the Butts and Walker cases, and has apparently distinguished between the two upon the factual basis that Walker involved "hot news", and that the article involving Butts was "so abusive" as to be "more of a libel at the Constitutional level than the one by the Associated Press."

It would appear that, under the rule of **New York Times**, neither the requirement for "immediate dissemination" nor the degree of abuse (if it be conceded that damage to the career of Butts was more abusive than false imprisonment of Walker in a Prison Hospital for Insane) provide a workable formula for ascertainment whether the respective publications were "knowingly false" or "in reckless disregard of whether it was false or not" in the instant cases.

At page 26 of its opinion, the Court appears to apply these standards only to Associated Press, as though it

were an entirely separate entity relying in good faith upon the reports of Savell, rather than recognizing that Associated Press, as his employer, was chargeable with responsibility for his acts and omissions, which were found by the jury to include a report that was false, not fair comment, not published in good faith as the honest opinion of the writer.

It has been recognized at page 14 of the Court's opinion that the Press maintains business conducted for a profit, often very large, and "must pay the freight" for damages inflicted upon the public in operations of such business.

Other businesses, both manufacturing and merchandising, are held by law to strict standards of "product liability." See **Associated Press v. U. S.**, 326 U. S. 1; **Moran v. Pittsburgh Des Moines Steel Co.**, 1948 (C. A. 3, Pa.), 116 F. 2d 908, cert. den. 334 U. S. 846, 92 L. Ed. 1770.

Under the rule of "necessity for rapid dissemination" applied to relieve Associated Press from liability in the instant case, the manufacturer of a defective device which may cause the death of an Astronaut could escape liability, as a question of fact, even though the employee or employees who actually fabricated the device may have known it was defective, or even though an inspection and approval by an employee, charged with quality control, may not have been the "honest opinion" of the inspector.

It seems inconceivable that such a performance would be classed as acceptable manufacturing standards.

In the instant case, it seems equally questionable whether the report of Savell (false, not fair comment, not representing his honest opinion) could meet the test of "accepted publishing standards." The question then arises, how can Associated Press be blameless where its agent has manufactured a report false, and not even his honest opinion.

It is respectfully submitted that this Court's opinion, in finding that the reporter, Savell, was trustworthy and competent, has overlooked the jury's findings to the contrary, in violation of the Seventh Amendment and has relieved Associated Press from its responsibility of Respondeat Superior.

Ground Five.

The Contradictory Results of the Butts and Walker Cases Constitute a Denial of Equal Justice and Due Process of Law.

The Goddess of Justice is always depicted as wearing a blindfold. Once the "hot news" concept is shown not to apply to this case, then Walker, the outspoken critic, should be treated the same as Butts, the coach. Equal Justice Under Law is the revered motto engraved over the entrance to this Honorable Court.

Actually, the Associated Press articles about Walker were more libelous than the Saturday Evening Post article about Butts and just as reckless. Walker was falsely accused of criminal acts which resulted in his arrest for insurrection, forcibly assaulting U. S. marshals and violating Sections 372 and 2384 of the U. S. Criminal Code. The affidavit of the U. S. Attorney attached to the criminal complaint against Walker swore that it was "on the basis of information obtained from Van H. Savell." See Appendix vii of Walker Answer to Amicus Curiae Brief of the Tribune Company filed herein.

Unlike Walker, Coach Butts was not arrested and incarcerated in a penal institution, and forced to post a $100,000 bond to regain his freedom because of the libel against him.

In addition to incorrectly assuming that the Walker libels were "hot news", this Court's opinion incorrectly assumes that the following facts indicating recklessness

by the Saturday Evening Post, were not, or their equivalent, attributable to the AP:

1. Failure to examine pictures of the events to see if they checked with the proposed defamatory story. (None of the many still and movie pictures taken at Ole Miss showed Walker leading a charge or doing any of the other illegal acts alleged by AP.)

2. Failure "to check the story with someone knowledgeable." (A check with other AP eyewitnesses or with United Press eyewitness Al Kuettner would have revealed that they "did not see Mr. Walker lead any charge" (R. 835).)

3. Publishing the defamatory story "without substantial independent support." (The Saturday Evening Post had some independent support from telephone long distance records showing that Coaches Butts and Bryant did have a telephone conversation at the time and date indicated by the informant who said he overheard their conversation. The AP made no effort whatsoever to obtain **any** independent support for its defamatory story.)

We know that this Honorable Court does not want its decision subject to the interpretation that the law of libel now has a double standard.

CONCLUSION.

As the final judicial authority, this Honorable Court has the power to relieve Associated Press from responsibility for the false report of its Newsman, and leave Walker to suffer a wrong without a remedy; but the question will still persist, "IS IT RIGHT?"

The vital issues in this case transcend the importance of the parties, even of Associated Press, probably the

largest and most powerful organization devoted to the collection, collation and dissemination of news for profit.

The components of the basic question (IS IT RIGHT?), include:

1. Should this Honorable Court convert itself into a jury, to re-weigh the facts from the record, in violation of the Seventh Amendment, to determine from the record without confrontation of witnesses, the truth or falsity of factual issues?

2. If evidence is to be re-weighed, should not responsibility therefor be returned to the trial judge, under directions from this Honorable Court, rather than a final judgment from the record?

3. Should Associated Press be relieved of their responsibility for acts of its employee, Savell, in making a report that has been branded by the jury as "false", "not fair comment", "not published in good faith, as the honest opinion of the writer" which findings are still undisturbed and part of the record in this cause?

4. Even under the "necessity for rapid dissemination", should such a performance by a Newsman of Associated Press be given judicial approach as "accepted publishing standards"?

The challenge of the late Gill Robb Wilson, referred to in Respondent's Answer to Amicus Curiae Brief, should still be applicable:

> "Once Again, Conflicting Ideologies Are Locked In Desperate Rivalry for the Key to Human Destiny."

A part of this "desperate rivalry" involves an all-out effort to sell to aggressive powers a concept of PEACE UNDER LAW, which contemplates Government of Law and not of men.

Of necessity and by definition, questions of fact are determined by men, while questions of law are resolved by principle, which, objectively applied to the instant case, would indicate answers to the above questions as follows:

1. The Seventh Amendment precludes re-examination by any Court of the United States of facts tried by a jury.

2. The Trial Judge, having heard the evidence, would be the only judicial officer properly responsible for determining whether the jury's finding, that the published report was false, not fair comment, not published in good faith as the honest opinion of the writer, was supported by competent evidence; and reversal of this case should, at most, involve a remand for such further proceeding.

3. Associated Press, as a Seller of News must "pay the freight" for damage inflicted upon Walker by false report of its agent, Savell.

4. Publication by Associated Press of a report from its Newsman, Savell, that was false, not fair comment and not published in good faith, as his honest opinion, would amount to a "severe departure from accepted publishing standards, even though published under necessity for rapid dissemination".

In urgently pleading that the Court take another look at its opinion in this case, it is respectfully suggested that the identity of the parties to this action may provide a basis for the Court to pass on to the trial judge the final responsibility for final determination of the question of fact, under all of the evidence, as to whether there is a "severe departure from accepted publishing standards." By Note 22 in its opinion, the Court refers to "Walker's prior publicized statements on the underlying controversy." The language of these statements is obviously

such as would reasonably place Walker at an extreme disadvantage in presenting to the tribunal he had so drastically criticized the responsibility for evaluating **facts** arising out of the same controversy; but words, alone, should never be sufficient to produce an inequality of Justice Under the Law, or denial of due process whereby facts tried by a jury are re-examined on Appeal.

This Honorable Court should apply the same principles of Respondeat Superior and Product Liability to the AP which it applies to all other business enterprises, as stated in **Associated Press v. U. S.**, 326 U. S. 1, 7 (1945):

> "Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. . . . The fact that the publisher handles news while others handle food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices."

It is respectfully submitted that the opinion of this Honorable Court is mistaken on key factual points; that either a Rehearing should be granted and the opinion of this Court corrected to eliminate a review of factual questions already decided by the trial jury, or the case remanded to the Texas courts for further proceedings to determine, under procedures not violative of the Seventh Amendment, whether sufficient evidence was presented to the trial jury to support its findings that the Associated Press report was false, not fair comment, not published in good faith, and whether it was published with "reckless disregard of whether it was false or not"; and also whether such publication would constitute a "severe departure from accepted publishing standards." Denial of this Petition for Rehearing would indicate that these

matters should be considered by the Texas courts under this Court's remand for further proceedings, rather than by this Court in a rehearing.

Respectfully submitted,

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Certificate.

The undersigned counsel for Respondent, Edwin A. Walker, does hereby certify that the above Petition for Rehearing is presented in good faith, not for delay, and is restricted to substantial grounds available to Petitioner, although not previously presented, particularly the issue that the judgment and decision of this Honorable Court is violative of the Seventh Amendment, as a review of factual questions decided by the trial jury.

Clyde J. Watts.

Dated July 5, 1967.