IN THE

Supreme Court of the United States.

October Term, 1966.

No. 37.

CURTIS PUBLISHING COMPANY,
Petitioner,

v.

WALLACE BUTTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETTION FOR REHEARING.

Petitioner, Curtis Publishing Company, prays the Court to grant a rehearing in this cause, in which judgment was rendered on June 12, 1967, affirming the judgment of the United States Court of Appeals for the Fifth Circuit.

STATEMENT.

The full Court was in agreement in this cause that the courts below erroneously held that the First Amendment conferred no protection on the publication found to libel the respondent. A bare majority concurred in the affirmance of the judgment for respondent, in the view that the jury verdict, interpreted in light of the instructions of the District Court, must have found the facts essential to the application of a rule of liability consistent with the Con-

stitution. But the majority, who thus controlled the disposition, were in disagreement as to what the rule of liability demanded by the Constitution is. Mr. Chief Justice Warren, joined by Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice White, who dissented from the disposition, held that the rule of *New York Times Company v. Sullivan,* 376 U. S. 254, applies. Mr. Justice Harlan, in an opinion joined by Mr. Justice Clark, Mr. Justice Stewart and Mr. Justice Fortas considered that "a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" (Slip Opinion, pp. 22-23). Their evaluation of the evidence and of the sufficiency of the instructions was thus conducted on the basis of a standard of liability inconsistent with the constitutional requirement prescribed for future cases by the Court. In addition, Mr. Chief Justice Warren, in concluding that the deviation between the instructions and the constitutional standard did not call for a reversal of the judgment, accorded weight to the "choice of the petitioner in this case to raise only truth as a defense." No other member of the Court accorded weight to this consideration. The contrary position, set forth in the opinion of Mr. Justice Harlan (Slip Opinion, pp. 10-13), was explicitly supported by six members of the Court and implicitly by Mr. Justice Black and Mr. Justice Douglas.

REASONS IN SUPPORT OF THE PETITION FOR REHEARING.

1. In light of the unusual division of the Court, described above, we submit that the retirement of Mr. Justice Clark affords compelling cause for reconsideration.

On reargument before a bench including Mr. Justice Clark's successor, there obviously is a substantial possibility that the result would be a different disposition. Such would be the case if the new member of the Court should share the view expressed in the dissenting opinion of either Mr. Justice Black or Mr. Justice Brennan. Such would be the case if he should share the views expressed in the opinion of Mr. Chief Justice Warren, except for agreement with all the other members of the Court that it was immaterial that the petitioner did not invoke the First Amendment at the trial. Such would be the case, if he should share the view as to the constitutionally required rule of liability expressed in the opinion of Mr. Justice Harlan but not agree that the issues of fact, which are material on that hypothesis, were actually resolved by the verdict. Such would be the case if, concurring in the views expressed by Mr. Justice Harlan, he were nonetheless to feel obliged to test the judgment by the rule of law that the Court declares for future cases. It also would be the case if, concurring in Mr. Justice Harlan's opinion with respect to the compensatory award, he should consider that a punitive award must be tested by the rule of *New York Times.*

When the judgment of the Court rests upon so many points of close division, we submit that any disposition should reflect a more durable consensus for the future than the disposition in the case at bar. *Cf. Rosenblatt v. Baer,* 383 U. S. 75; *Time, Inc. v. Hill,* 385 U. S. 374. Equal justice under law is not a perfectly attainable ideal but its attainment will be furthered if the judgment in this cause is reconsidered by the Court that will convene at the next term.

2. Quite apart from the division of the Court and the retirement of Mr. Justice Clark, we believe that reconsideration is required by the fact that the opinion of Mr. Chief Justice Warren and that of Mr. Justice Harlan both proceed on the assumption that the jury verdict implied an affirmative finding that the allegedly defamatory statements in the article were false. Thus the Chief Justice said: "Under the Georgia law of defamation which governed the case, the jury was also specifically required to find that the defamatory statements were false before it could award any damages, and it was so instructed" (Slip Opinion, p. 5). Mr. Justice Harlan was less explicit on the point, but we believe the same thought is implicit in his reference to "improper conduct which creates a false publication" (Slip Opinion, p. 20) and to a "defamtory falsehood" (Slip Opinion, p. 23).

With great deference, we submit that the instructions of the District Court did not call upon the jury, either with respect to the compensatory or the punitive award, to find that the challenged publication was false. Over and over again, the charge emphasized that the *defendant* had the burden of proving substantial truth by a preponderance of evidence (R. 1021, 1022, 1023, 1027, 1032). Indeed, the jury was explicitly directed that if "the defendant has not carried itsburden by proving its plea of justification, then it will be your duty to return a verdict for the plaintiff" (R. 1032; see also R. 1023). Though it was said, in relation to punitive damages, that the "burden of proof to establish the facts of actual malice is upon the plaintiff" (R. 1026), the jury could not possibly have thought that this involved a shift of burden with respect to proving falsity or truth, as it passed from the compensatory to the punitive award. The charge makes clear, what was the fact of life, that the jury was admonished to consider damages on the assumption that the article was false, unless it was convinced that it was true.

This aspect of the instructions of the District Court violated the rule of *New York Times* even more grievously than the definition of malice (R. 1026-1027). For *New York Times* not only holds that malice must consist of conscious falsehood or reckless disregard of truth (376 U. S. 254 at 280). It also explicitly rejects as inconsistent with the First Amendment a rule of liability which calls on the defendant to establish truth (376 U. S. at 279). While the opinion of Mr. Justice Harlan in this cause does not address itself specifically to this issue, we do not read it to reject this element of the standard prescribed in *New York Times.* If that element is to survive, we submit that no amount of skepticism as to the operative impact of the details of instructions can sustain the disposition in this cause. The jury was told in so many words that unless the defendant proved the truth, the plaintiff was entitled to compensatory damages and might be given an additional punitive award, if the defendant published with "intent to injure" him (R. 1026).

The thought that the jury found, first, that the publication was false in substance and, second, that the defendant conducted an insufficient inquiry to ascertain its falsity or truth, far from constituting a realistic appraisal of this record, misses the essence of what occurred. In a situation involving intense local feeling and fiercely competing loyalties, the instruction as to the burden of proof assuaged the conscience of the jury, freeing it to punish the defendant without taking a position as to what the nature and import of the Butts-Bryant conversation was. If the Court means, as we believe it does, to condition a recovery in such a case as this on the plaintiff's proof of falsity, this record calls for a new trial. *Cf., e.g., Shuttlesworth v. Birmingham,* 382 U. S. 87, 92; *Ashton v. Kentucky,* 384 U. S. 195, 198.

CONCLUSION.

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

HERBERT WECHSLER,
PHILIP H. STRUBING,
Attorneys for Petitioner,
Curtis Publishing Company.

CERTIFICATE OF COUNSEL.

We, Herbert Wechsler and Philip H Strubing, attorneys for the petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith, believing it to have merit, and not for delay.

HERBERT WECHSLER,

PHILIP H. STRUBING,
Attorneys for Petitioner.