INDEX

AUTHORITIES

CASES:

In the
Supreme Court of the United States
OCTOBER TERM 1966

No. 150

THE ASSOCIATED PRESS,
Petitioner,

VERSUS

EDWIN A. WALKER,
Respondent.

REPLY TO SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

By Supplemental Brief, the Associated Press has presented to this Honorable Court a recent (15 Aug. 1966) decision by the Supreme Court of Colorado in *Walker* v. *The Associated Press,* wherein the Court squarely held that the Rule of *New York Times* Co. v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412, applies to this epic battle between Walker and The Associated Press, "to the end that even though the news release be libelous per se, plaintiff still cannot recover unless he is able to show actual malice,"[1] as therein defined.

[1] From page 7: "We now hold that the Rule of New York Times Company v. Sullivan, supra, applies to the instant controversy to the end that even though the news release be libelous per se, plaintiff still cannot recover unless he is able to show actual malice, as defined in the New York Times Company case, on the part of Associated Press."

We appreciate this opportunity to bring into actual focus the *Sullivan* Rule, if applied to General Walker as a "public figure."

The Rule of *Sullivan* is precise and simple: The First Amendment to the Constitution protects the Press from libel, unless a defamatory statement is published with ACTUAL MALICE which is defined as:

> "1) KNOWINGLY FALSE, *or* 2) IN RECKLESS DISREGARD FOR THE TRUTH."

Under this Rule, malice is established, simply and conclusively, by the language of Associated Press in its news report:

> "*Walker assumed command of the crowd,* which I estimated at 1,000 * * *."
>
> "*Two men* took *Walker* by the arms and they *headed for* the Lyceum and the *Federal Marshals.* Throughout this time, *I was less than six feet from Walker.*"

The jury found that this report, charging plaintiff with a felony, was false; and, implicit in its verdict, is the finding that it was knowingly false and published in reckless disregard for the truth.[2]

With the Savell report having been issued and sold under an "Editor's Note," "Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and *saw what happened,*" and with the author of the report

---

[2] See Answer to Special Issues (Respondent's Brief, Apx. A, wherein jury held that the Savell report that Walker led a charge: a) was not substantially true, b) was not fair comment, c) was not made in good faith.

claiming to have seen, from a distance of six feet, a criminal act on the part of Walker, which the jury found that Walker did not commit, the report cannot be less than KNOWINGLY FALSE.

In addition, such falsity on the part of the greatest news media on earth, when measured by necessary standards of accuracy and integrity, as contrasted with the loose and heedless actions by which plaintiff was branded as a criminal and a lunatic, amount to RECKLESS DISREGARD FOR THE TRUTH, and not "reportorial negligence" which could be argued as being within the protection of *Sullivan.*

The Associated Press reported to the world that plaintiff, a former Major General in the United States Army, had "ASSUMED COMMAND" of a mob and led a charge against United States Marshals. The jury found that the report was false. It is respectfully submitted that a fair evaluation of the evidence in this case will reflect that the report was "knowingly false" and "in reckless disregard for the truth."

Proposition I

As an "eye-witness" report, the Savell story was either true or knowingly false.

Before *New York Times* v. *Sullivan,* a false charge of a crime was libelous *per se*; and the only defense was TRUTH. The "*Sullivan* Rule" has changed the law, however, and has extended to the Press the awesome privilege of defamation, limited only by the element of MALICE. Even the concept of malice has been changed from actual ill-will, which is almost impossible to prove, to a simple

standard of "knowingly false" or "reckless disregard of the truth." As stated in *Garrison* v. *State of Louisiana,* 379 U.S. 64, 13 L.Ed.2d 125:

> "Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

In the instant case, Associated Press elected to publish an eye-witness report by its newsman that he had seen Walker committing a crime, thus breaking a highly sensational and saleable news report well in advance of Walker's actual arrest, which could have been published with absolute immunity . . . if and when Walker had been charged with a crime and arrested. The possibility remains that he may never have been charged and arrested, had not Associated Press issued its false report.

The jury has specifically found, upon ample evidence, that Savell did not see Walker commit the crime with which he was charged. Having accepted and reported to the world that their newsman was an eye-witness, the Associated Press is in no position to side-step responsibility for his false reporting, and the jury's determination of such falsity, by claiming that it was not knowingly false.

It is respectfully submitted that the jury's finding of falsity of the Associated Press report that Plaintiff had been seen by its newsman committing a crime would preclude the defendant from contending that the report was not knowingly false.

Proposition II

Under standards of accuracy and integrity reasonably applicable to Associated Press, the false report of Walker asasuming command of a mob and leading a charge against U. S. Marshals, a crime against the Government of the United States, was published in reckless disregard for the truth.

Neither *Sullivan* nor subsequent decisions from either the United States Supreme Court, or other Federal Courts, have established guide lines for determination of "reckless disregard for the truth." Obviously a question of fact, it would appear that a jury in determining whether a false publication resulted from simple negligence, or reckless disregard for the truth, must consider two basic elements: 1) The nature of the duty owed by the author, to the public and to the victim of the false report, and 2) How the duty was, in fact, performed . . . *i.e.,* how and why a false report was published.

This issue has previously been litigated in the Texas Courts between the parties to this action; and, in support of our concept of the nature of the profound and vital duty owed by Associated Press to the public, as well as to an individual who may have become the subject of one of its news reports, we quote from Appellee's Brief in *Walker* v. *Associated Press* (Tex. Ct. of Civ. App., 1965), 393 S.W.2d 671, as follows:

> (p. 1) " 'ONCE AGAIN, CONFLICTING IDEOLOGIES ARE LOCKED IN DESPERATE RIVALRY FOR THE *KEY TO HUMAN DESTINY.*'
>
> "Thus, Mr. Gil Robb Wilson, Editor of FLYING Magazine challenges his fellow Americans to the stark reality of the current global stuggle. The issues at stake involve the survival of Freedom as we know it.

"Comparison of the Objectives, the Strategies and the Tactics of the two ideologies may reveal that the 'KEY' is . . . INTEGRITY . . . of which the basic element is TRUTH.

"Vital decisions under one ideology are made by ruthless rulers, who use propaganda, with its components of deceit, fabrication and falsehood for human motivation. Its concepts of Justice are shaped solely for enhancement of the power of the ruling oligarchy . . . never by the rights of the individual.

"The other ideology preserves both Freedom and Justice upon a broad base of individual knowledge and is devoted to a concept of Equal Justice Under the Law. The indispensable element of true knowledge is timely and accurate information, for which the American citizen is completely dependent upon a highly organized system of gathering and disseminating news.

"Against this background, the issues now before this Honorable Court transcend the interest, of the respective parties, and involve principles vital to the survival of our form of Government.

"In the jet-propelled and supercharged orbit of modern civilization, and particularly with electronic communication facilities which can encircle the world at fantastic speed, words have become the most lethal weapons known to man.

"They can start and stop wars, create or destroy illusions, depict or deny reality, imprison or release a citizen and launch or finish a career.

"By a fabulous network of communications, the Associated Press has acquired an ultimate capability in word usage . . . for the shaping of thoughts and knowledge of the people of America, and perhaps the whole world.

"Such power implies an equivalent duty with commensurate standards of accuracy and integrity. Upon faithful performance of this duty, Freedom depends.

"In the instant case, the unsupported and unverified report of an inexperienced 21 year old reporter has created of the Appellee, Walker, a false public image as a lunatic and insurrectionist. Upon Savell's report that Walker had assumed command of a crowd of rioters and led a charge against U. S. Marshals, Walker was arrested, and, without notice, counsel or hearing, and, upon affidavit of a psychiatrist who had never seen him, he was committed to a Government mental prison.

"The accuracy, the integrity and the motivation of the Associated Press in publishing this report has been weighed in the balance of jury trial, and, by unanimous verdict, has been found wanting. Appellant seeks to overturn this verdict by an appellate review of the evidence and a claim of privilege.

* * * * * *

"The soundness and logic of the above rule of the Texas Courts is forcefully illustrated by the facts in the instant case, and the wrong suffered by Walker in terms of false imprisonment and being branded as a lunatic and insurrectionist, as the result of the false charge that he had assumed command of a riotous group of students and others, and had led a charge against U. S. Marshals, who represented the authority of the Government.

"There is no amount of comment or criticism that would have caused his imprisonment. Even if the Associated Press had owed to its subscribers a duty of commenting upon Walker's activities, which the Associated Press has repeatedly pointed out is beyond the type of service which it provided, it would only have

criticized his statements and activities. Such criticism or comment, even though caustic and derogatory, could come within the protection of privilege. But, when the statement is one of fact, and particularly of such serious nature as to impute a crime, the author of the statements must, under the law, be prepared to prove the truth of the statement.

"Publication of false facts can produce prosecution!

"Publication of comment, whether true or false, cannot!"

When measured by the awesome responsibility concurrent with its vast power, the performance of Associated Press in publishing this false report concerning plaintiff requires the conclusion that it was more than "reportorial negligence," and was published "in reckless disregard for the truth." Facts which establish the conduct of Associated Press as reckless disregard for the truth, rather than reportorial negligence, include the following:

1) The report was FALSE, as found by the jury.

2) Appellant relied solely upon the unsupported telephone report of an inexperienced 21-year-old cub reporter, completely unsupported by any other informant or evidence.

3) Associated Press should have been on notice of the falsity of Savell's story, when he first reported to A-P newsman, B. R. Thomas at New Orleans, that Walker had made an inflammatory speech from a Confederate Monument, *and then led a charge against U. S. Marshals.* Further verification should have been required when Savell later reported that Walker first entered the campus, assumed command of the crowd,

led a charge of 1,000 people, *and then* fell back to the Monument and made his speech.

4) For many days after the incident, Associated Press continued to issue republications and repetitions of the original false report, without any effort toward further investigation or verification of Savell's story. A typical example appears from the deposition of "ace" AP newsman, Relman Morin, who admitted that Savell was "the only one I can specifically remember," who had reported seeing Walker lead a charge.

5) A most flagrant example of slanting of the news concerning Walker is reflected by the testimony of AP Newsman, Louis Milliner, who admitted that he had reported to his New Orleans news room that a Government psychiatrist, Guttmacher, had testified that he found evidence of mental deterioration on the part of Walker, and also reported to the same news room that the court-appointed psychiatrist, Stubblefield, had found that Walker was "functioning at the superior level of intelligence." Associated Press published the report of Walker's mental deterioration on its "A" Wire, with circulation around the world. The Stubblefield report of superior intelligence was put on the "B" Wire, with restricted local coverage.

The record is replete with evidence refuting the contention of defendant, as allegedly supported by its witnesses, that Walker actually led a charge.

Defendant rests its whole contention that Savell and Associated Press were guilty only of "reportorial negligence" rather than reckless disregard for the truth, upon testimony of its own witnesses. A review of the defendant's evidence will reveal shocking conflict in the testimony of

defense witnesses, for example, Rev. Duncan Gray refuted the testimony of witnesses, Gregory and Savell, that Walker led a charge *before* his speech from the monument. The conflict between testimony of various witnesses for defendants, and the implausible stories of others leaves the impact of their testimony almost as unbelievable as the fabricated Savell story published by AP. The quality of their testimony, singly and collectively, is not such as would convince a jury that Savell even thought he saw what he reported. In fact, it is probable that the lack of candor and consistency in their testimony, together with absence of Savell from the courtroom, caused the jury to lose confidence in the entire defense of Associated Press.

In furtherance of Principles of Justice, the disparity in power between Associated Press and a private citizen should be weighed and considered in determining "reckless disregard for the truth." Once an individual is falsely reported to have committed a *criminal act,* or to be of deficient mentality, he is powerless to correct the false image, regardless of his innocence or sanity. His reputation and public image are completely at the mercy of the news media, and he can look only to the law for reasonable protection and vindication of his record.

With reputation more precious than wealth, and the citizen in no postion to debate with a newspaper, and certainly not Associated Press, a realistic protection against defamation is a critical necessity under the *Sullivan* Rule. Such protection must recognize the helplessness of the victim.

Recent decisions of this Honorable Court have well protected against official "overbearing" the rights of one accused of a crime. As illustrated in *Miranda* v. *State of Arizona* (U.S. Sup. 6/13/66), 86 Sup. Ct. Rep. 1602:

From page 1611:

> "* * * basic rights that are enshrined in our Constitution—that 'No person * * * shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall * * * have the Assistance of Counsel'—*rights which were put in jeopardy in that case through official overbearing.* These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured 'for ages to come * * * designed to approach immortality as nearly as human institutions can approach it.' "

Rights of a citizen must be protected from those holding superior power.

If the conduct of the Associated Press in the instant case is condoned as simply a negligent misstatement, rather than reckless disregard for the truth, the right of a citizen to secure vindication for defamation as a question of fact for injury will be destroyed as a matter of law.

Equal weight and consideration should be given to the *Duty* and *Responsibility* of the Press, as well as to Freedom of the Press. Without a *legal duty* and responsibility, clearly defined and recognized, Freedom of the Press can degenerate into oppression. The privilege of the Press can sink into license . . . to smear . . . to create false images . . . to slant news . . . to propagandize. Once this cycle is

started, we can expect competition between different wire services, between different newspapers and between different types of news media, for the most senational and saleable items of news. In such competition, the one least restrained by concepts of accuracy, integrity and responsibility would have a substantial competitive advantage over the other. The dividing line between fact and fiction in the news will become more obscure. The news media will become more and more inclined to make the news, rather than to report the news. Public confidence in all of them will deteriorate in a manner most unfortunate for public welfare.

It would create a most dangerous precedent for the Court to hold in this case, as a matter of law, and contrary to the verdict of the jury, that the Associated Press report was not published in reckless disregard for the truth. It seems inconceivable that an expert and highly organized news gathering agency could fail to observe a "red flag" when telephone reports from a cub reporter contain hopeless and irreconcilable conflict as to time and place while relating the occurrence of an event so sensational as leading the charge of a mob against U. S. Marshals by a former Major General in the U. S. Army. Further investigation must have disclosed the facts, as related by defendant's witness, Rev. Duncan Gray, that there was no generalized charge of any kind before Walker's speech on the monument, and that a 1,000-man charge, such as described by Savell would literally have run over the Rev. Duncan Gray, and many other witnesses offered by the appellant. Such a charge did not happen, and the slightest investigation by Associated Press after the original discrepancy appeared between the report of Savell to Thomas

and the subsequent reports by Savell would have revealed that the charge described so dramatically and so extensively by Savell in his eye-witness report was a figment of his imagination. It would not be unreasonable for a jury to consider such action upon the part of Associated Press as reckless disregard for the truth, when the falsity of this report had been proved under the circumstances involved in this case.

It is respectfully submitted that the verdict of the jury in this case is supported by evidence of reckless disregard for the truth, as well as publication of a false report with knowledge of its falsity.

CONCLUSION

The Associated Press has expanded and been organized to the point where it has almost a monopoly upon nationwide and worldwide news gathering facilities for informing the people of this country as to current developments in the news. [*Associated Press* v. *Taft-Ingalls Corp.* (6 Cir. 1965), 340 F.2d 753, 766.] Upon the accuracy and integrity of this constant flow of information depends the current knowledge of the people and their confidence in their security, their social and business affairs and their Government.

Like "Caesar's Wife" these news media must be above suspicion, or even question; and it will eventually become a disservice even to Associated Press if it were relieved of legal responsibilities for a false news report that accuses a citizen of a crime and causes his imprisonment. Unless the Associated Press is able, willing and required to lay on the line its financial responsibility as a guarantee of accuracy

and integrity of reporting such news, "news slanting" and "image making" will become even more rampant than they are today; and the reputation of all whose names may be projected into the news as "public figures" will depend solely upon the whim of newsmen, even down to "cub reporters," under a law which recognizes that they can do no wrong.

The present greatness of our country has evolved, to a large extent, from the "pendulum action" of the public opinion of its citizens. With information available to them, accurately, adequately, timely and honestly, the swinging of the pendulum, from left to right and right to left assumes a gyroscopic effect upon the thought processes of the people, and particularly upon their ability to govern themselves. It is, therefore, of vital importance that the pendulum swing freely, and that information and knowledge be gathered and disseminated with the utmost care, concern and integrity.

The slanting of news, for any purpose, or without purpose, can only warp public opinion and freeze the free-swinging of the pendulum.

For many years, the rule has universally been recognized that false accusation of a crime is libelous *per se*. Under *Sullivan,* it is libelous only where malicious (knowingly false or in reckless disregard for the truth).

As recognized by the jury in this case, the facts present a flagrant example of false reporting by Associated Press.

It is respectfully submitted that the jury's verdict is supported by the evidence, both as to knowledge of falsity and reckless disregard for the truth on the part of Associated Press, and should not be disturbed by certiorari from this Honorable Court.

Respectfully submitted,

WILLIAM ANDRESS, JR.
627 Fidelity Union Life Building
Dallas, Texas

CLYDE J. WATTS
219 Couch Drive
Oklahoma City, Oklahoma

Attorneys for Respondent,
Edwin A. Walker

September, 1966

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply was served by depositing a copy of the same in a United States mail box with air mail postage prepaid addressed to William P. Rogers, Leo P. Larkin, Jr., and Stanley Godofsky 200 Park Avenue, New York, New York 10017, and to Arthur Moynihan, 50 Rockefeller Plaza, New York, New York 10020; and with first class postage prepaid addressed to J. A. Gooch and Sloan B. Blair, 1800 First National Building, Fort Worth, Texas 76102, Counsel of record for Petitioner on September 7, 1966.

Counsel for Respondent