

ORAL ARGUMENT – 12/03/03
03/0019
NEW YORK TIMES V. ISAACKS

HEMPHILL: The speech at issue in this case was political commentary. It's at the heart of the 1st amendment in Art. 1, §8 of the Texas Constitution. The satire that was published in the Dallas Observer was a criticism and a critique of the official actions of elected public officials and, thus, is entitled to full constitutional protection.

PHILLIPS: What if your satire was so subtle, and I think there's been some of this in some of the Journals of Medicine, it's so obtuse that nobody gets it, or maybe one person in a thousand gets it.

HEMPHILL: I think that that would be potentially dispositive of the issue of whether it is reasonably capable of a defamatory meaning, which is the threshold question in any liable case. The answer then might be, Yes. It is reasonably capable of a defamatory meaning. It would not however answer the second issue that's present in this case, which is the constitutional actual malice question.

HECHT: Well if it's not satire it looks like it's plainly _____. You know it's not true. That's the whole point of satire.

HEMPHILL: That's exactly right. The whole point of satire is that it is fiction, that is a take off on real events stretched in to an absurd extension of _____.

HECHT: So if it's reasonably capable of defamatory meaning, it looks to me like there's almost actual malice. Is it a question of law?

HEMPHILL: I don't think so. Because if there is no intent that the reasonable reader interpret it as fact, or no knowledge or strong suspicion that it will be interpreted as fact. In other words actual malice is an inquiry into the subjective state of mind of the speaker at the time the speech is made.

PHILLIPS: No. The SC spent 40 years drumming it in to our head at the bench and bar that it doesn't have anything to do with your state of mind.

HEMPHILL: It doesn't have anything to do with ill will or spite or anything like that. But it has to do with your subjective attitude or knowledge about what you were saying. Actual malice is an inquiry into subjective state of mind. In the typical case when you have a news story that is unquestionably presented as fact, the inquiry is in an actual malice case, did the defendant know subjectively that that information was false? or did the speaker know it was probably false and presented as fact anyway? It is inherently a subjective inquiry into the state of mind about whether

the defendant believes he has communicated falsity passed off as fact.

PHILLIPS: So would you say it's always open to a defamation defendant to say my article was merely a satire. It was just too subtle for anybody to catch it. And then a fact finder can get mad at that if indeed it's blatantly _____ and run up the damages in retribution or something?

HEMPHILL: Certainly a defamation defendant would say I didn't mean this to be taken seriously. But the surrounding circumstances might make that denial so incredible that it is in fact a jury issue.

PHILLIPS: So essentially yes, you can always try that - under your vision, which is if it's satire it's got to turn the New York Times rules on their head. Under the vision of that then that is something a defamation defendant could try. They just do it at their risk if there's no objective indicia that it is satire.

HEMPHILL: I think that's accurate. I would not say, however, that in our position on actual malice if we're trying to turn it on its head. I think that our position of what the actual malice test is...

PHILLIPS: Well but they know it's false. It's not funny if it's not false.

HEMPHILL: Exactly right.

PHILLIPS: So the essential test of the New York Times is met here - I mean that's your opening gambit is, yes. this was so false people were suppose to laugh at it.

HEMPHILL: I agree that it's so false people were supposed to laugh at it, but I do not agree that the central test of New York Times v. Sullivan is met. Because the central test of New York Times v. Sullivan requires a false statement of fact. One of the parity cases that we cite is Morgan(?) v. _____ out of the 9th circuit, and it was also cited and discussed with approval by the CA in this case. It says before there can be any false statement under New York Times v. Sullivan, there must be a statement of fact, a statement that is held out and presented to the reader as fact. Fiction is not presented as fact. It is not false because it was not intended to be passed off as fact. And that is the critical issue here, that New York Times v. Sullivan and most liable cases take for granted. Because in most liable cases what you have is information that is unquestionably being presented as fact. And the inquiry is only, Did the defendant know or strongly suspect that it was false and publish it anyway?

HECHT: Assuming that it is satire, could it nevertheless be defamatory because it characterizes the people involved as silly or stupid?

HEMPHILL: No. Because that would be an opinion.

HECHT: It might be an opinion, but it might be the writer thinks that the whole world should think that this is silly and stupid.

HEMPHILL: To put question to a concrete example. In this case the ultimate message that the Dallas Observer was trying to convey to the reader was that the actions of the plaintiffs and others who were involved with the actual jailing of a 13-year old boy for writing the Halloween essay were misguided. That is a pure opinion. Whether it was misguided or not is absolutely protected.

PHILLIPS: What if there had been no underlying case? There hadn't been the 13-year old boy. They just ran this thing with real names of judges and a totally false scenario and said we just meant for this to be a satire on what lawyers and judges do for a living.

HEMPHILL: I think that that would be a much closer case.

PHILLIPS: Where is this line and how do we articulate it? I mean the court seemed fairly clear that you don't get out of defamation just because you say it's an opinion, or just because you say it's a satire. But where do you draw the line between permissible and impermissible comment?

HEMPHILL: I think there are two answers to that question. The first one is looking at the issue of whether it is reasonably capable of a defamatory meaning? And that is that you have to consider the context in which the speech is made in making that determination. The context in which this speech was made is there was an ongoing controversy nationwide and even internationally over this incident that happened up in Connor(?) where the 13-year old was thrown in jail. Absent that on-going controversy the reasonable reader would have a different interpretation of the article. And might very well not understand that it was commentary on that. But that still doesn't speak to the actual malice issue about whether there was an intention to portray it as truth.

OWEN: What if the subjective state of mind had been we want the public to hold this judge and prosecutor up to ridicule because we think as you printed it they were misguided. And so we're going to write the satire so subtlety that some people might believe it's true. Which is what happened here. And so it turns totally on the subjective intent of the writer doesn't it of your theory?

HEMPHILL: I'm not sure - I think it does make a difference if there's a subjective intent or strong suspicion that readers would be fooled. I don't think there's any evidence in the record here that that was the case, that there was any subjective intent that readers be fooled or even subjective suspicion that readers would be fooled. It came as a complete surprise to the defendants when they started getting calls by people who might have...

OWEN: My point is, you're asking us to say that it all is subjective. It turns on subjectivity.

HEMPHILL: On actual malice it does. Because actual malice is an inquiry to the subjective state of mind. Not regarding the plaintiff, but regarding whether or not something is being passed

off as true when it's really false.

WAINWRIGHT: And the context of this would have made the article more obviously satire. Don't you agree if it were not on the news page and if there weren't quotes attributed to the real persons which the US SC has commented on being particularly damaging to the reputation of people?

HEMPHILL: To some extent, but I think that there is important things to keep in mind about both the news heading and the quotations. This article was not labeled as news if that phrase labeled as news means there was a conscious decision to say we are going to slap a header up here that says news. The evidence is that everything that was in the front section of the Dallas Observer was in a section called News. This is an alternative weekly newspaper. It doesn't have a traditional opinion page. It has points of view expressed in its reporting all the time. And the evidence is that there were columns and other statements of opinion regularly run the news section. So that's uncontroverted evidence and the CA did not rely on the news heading as evidence of intent to mislead.

HECHT: Would it make a difference if some of those factors were changed. Like it was not an alternative paper. You did have more of an expectation that it would be news, that sort of thing.

HEMPHILL: I believe so. Because context as we said is important in evaluating whether it's reasonably capable of a defamatory meaning. The context of the Times, context of what's going on in the public debate, context of what sort of media it is. All these things are important when you read the article as a whole and in context and apply an objective reasonable reader standard which is what this court has frequently said is the standard, an ordinary reader or an objective reasonable reader.

WAINWRIGHT: What if the article here had attributed criminal acts to the real persons. Would that change your position?

HEMPHILL: It would depend entirely on what the criminal acts were. If they were inherently and probable, or outrageous as we believe the quotes here were. Inherently unbelievable...

WAINWRIGHT: Let's assume they are reasonably possible. Add that to the article as it exist.

HEMPHILL: As it exist if there was only one thing added, again it depends on context. Probably not because there are so many clues in this article that it is a satire not to be taken literally. There is a group that's called GOOF. The word GOOF appears in all capital letters, which is in our view the functional equivalent of a label of satire when we say goof. There are the outrageous quotations. A judge saying we should panic and overreact. Then Gov. Bush saying that where the Wild Things Are on our children book is violent, deviant over tones. There are so many things that are inherently improbable in here that they overwhelm the limited indicia of reality that are there to

set up the satire, that have to be there to set up the satire.

O'NEILL: What if it is clearly capable of a defamatory meaning? What if you have something that ____, and the line is so blurred that it is not easy. In fact it's difficult to tell whether it is satire or not. Under your scenario though you could never get actual malice because the author subjectively thought it was obvious.

HEMPHILL: Almost correct. I would not say that you can not get actual malice because even when the author disclaims intent to mislead or knowledge that the readers would be misled, there still can be substantial evidence that could point towards actual malice. In other words, the ...

O'NEILL: What would that look like?

HEMPHILL: It could be a number of things. In this case for example, posit an early draft of a satire that was clearly outrageous in its material, clearly fictional. And posit an editing process through which the clues get squeezed out or made less obvious, or less clear. In other words during the editing process the satire becomes less outrageous and less clearly fictional.

OWEN: What difference does it make if it's done in a draft or in someone's head?

HEMPHILL: Or in someone's head. I think you're right. If there's testimony that says you know what? We had a really outrageous satire and you toned it down before we published it, and the result was that it made harder to figure out that it was satire. That might be circumstantial evidence of actual malice.

O'NEILL: But they still testified that we're shocked. We toned it down. But it was still we think clear. It seems like under the construct you've set up, you could never get actual malice as long as the person said it was clear to me. I think everyone else is cerebrally challenged, but it was clear to me.

HEMPHILL: I think that there can be circumstantial evidence that overcomes that. And that's true in every actual malice case regardless of whether it's a satire or not.

PHILLIPS: Could there be circumstantial evidence in this very case then that could in your view could get the plaintiffs to the jury? That is maybe one of the authors is a relative of a challenger to one of these public officials, or there's a statement that we think judge so and so's ruling was stupid and we're going to bring them down with an article that will get the radio shows.

HEMPHILL: You're talking about hypothetical evidence? Yes. I believe...

PHILLIPS: I mean so this very article, the same newspaper, same placement, same print style, could be different with other external evidence?

HEMPHILL: Absolutely. Now that doesn't say anything about whether it's reasonably capable of a defamatory meaning.

PHILLIPS: All of this context goes to the judge, we're not going to trust the fact finder with it.

HEMPHILL: No. I don't believe so.

PHILLIPS: But I mean in this case, you haven't had a trial. You don't want a trial. But you're admitting there could be one more piece of evidence out there that would make this a fact issue for a jury?

HEMPHILL: For example. If in discovery one of the editors would have said the author came to me and said, You know what? I've been thinking about making this a parity that will be obvious on it's face. But you know what? I think instead I want to fool readers. Instead I want to trick them. I want it to be a prank. I don't want anyone to get it. If there was evidence like that.

HECHT: You think that it's possible for there to be evidence of actual malice, but you don't think that as to reasonably capable of defamatory reading?

HEMPHILL: I agree with that. Because of the inherent improbability and outrageousness of the very content of the article.

PHILLIPS: So in other words, the writer could have every intent in the world of ruining the judge, and you would say they didn't do a good enough job. It's clearly a parity. The TC has to grant us summary judgment.

HEMPHILL: Yes. It depends upon what you mean by ruining the judge.

PHILLIPS: The writer could intend to be defamatory. That could be their sole purpose, and they could have done such a sloppy job of it, that it's not reasonably capable.

HEMPHILL: I guess that is conceivable. I don't see that as a likely scenario. Because you're positing a scenario in which the author says, I'm trying to mislead my readers. I want them to believe something is true that's not true, something objectively verifiable that's not true, but they didn't do a good enough job doing it. It sounds inherently improbable, but I think theoretically possible.

HECHT: How much difference does it make who the community of listeners is?

HEMPHILL: I think it does make some difference. But in a case like this, I think the audience that we're talking about is pretty much your average people. I think there is a difference because of the nature of the publication as opposed to the nature of the audience in this circumstance.

But I'm not sure that there's much difference in this particular case about the nature of the audience.

SMITH: Is the Dallas Observer principally distributed in Dallas County?

HEMPHILL: Dallas and surrounding counties.

SMITH: And so it's widely available in Denton County?

HEMPHILL: Yes.

SMITH: Your answer there about what your so called reasonable reader, you're trying to say that the average reader of the Dallas Observer is basically equivalent to the average resident of Dallas, Denton or surrounding counties?

HEMPHILL: I think there is a different demographic.

SMITH: Is there anything in the record about how do we judge that?

HEMPHILL: I don't think there is.

WAINWRIGHT: You would agree wouldn't you that the newspapers and the media generally have an obligation to make statements that are not false, and to do that without being reckless as well? Not intentional false and not recklessly false.

HEMPHILL: Recklessly false if defined as knowledge of probable falsity. Yes.

WAINWRIGHT: Defined by Sullivan?

HEMPHILL: Correct.

WAINWRIGHT: Would you also agree that the media should not be able to circumvent that by clothing a statement under a characterization called satire?

HEMPHILL: If the statement was intended or expected to be perceived as fact. Yes. But when the statement is not being held out as fact, is not trying to be passed off as fact and there is no suspicion that it will be taking as fact, then I think it's a different story. And I think that's the case here.

O'NEILL: What if the suspicion that it can't be taken as fact is completely unreasonable? I mean what if it's obvious that most people would take it as fact because of just the way it's written. How would you ever get to the actual malice case under your formulation? The average reader would clearly be confused and could easily take it as fact. If that were the case, then how would you ever get to actual malice if all the author has to do is say I didn't anticipate, that when it was

painfully obvious that it could be?

HEMPHILL: This court has dealt with actual malice several times recently, but most recently in Bailey v. Bunton. That was kind of what was going on there is that the defendant, the main defendant was _____ Bunton was saying I believe this judge was corrupt. And there was objective evidence that he was wrong. How did the jury get to actual malice and how did a majority of this court affirm the finding of actual malice? Because there was other evidence that he was going out saying, You know what? I know that that judge is corrupt. I just don't have anything on him. So someone saying I did not act with malice, is not dispositive. But there has to be some evidence in the record to show that there was passing off of falsity as true. There was according to the majority in Bailey v. Bunton there is no such evidence here.

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RESPONDENT

WHITTEN: It's true that a lie once published takes a life of its own, and the truth rarely catches up. In late Oct. 1999, a 13-year old child from Ponder was detained by authorities on a charge of making a terrorist threat. According to the probable cause affidavit, the child had written a letter threatening to kill two students and a teacher. It said nothing about how Halloween essay. That wasn't before the judge. Nobody said anything about how a Halloween story.

She looked at the four-corners in the affidavit, heard brief testimony that the school officials because of past disciplinary problems with this child, in bullying or threatening two of the children that were named in the so-called letter, made a determination to detain the child. Immediately appointed him a very experienced lawyer who is now in the first class of those certified as _____ the law experts.

The so-called legitimate press picked this up mainly when the boy's mother didn't go with the court appointed lawyer, hired a Dallas lawyer who immediately ran to the press and told the story that he had been put in detention for writing a Halloween story. So that lie, falsehood, although not actionable because I think the legitimate press did not act with constitutional actual malice can prove that they knew that that was false when they published it, led to this so-called satire that has devastated my clients, subjected them to threatening letters, e-mails, phone calls, and so forth.

Now turning to the law in the case. It just proves this is a case of first impression. Nevertheless, it's controlled by well established rules of law set forth in New York Times v. Sullivan, Milkovich v. Lorain Journal, and Hustler Magazine v. Jerry Farwell. It's also a case which will determine whether the law set forth in those cases and their progeny preserves an actual right for public officials to have actual recourse for false, defamatory statements of fact which impugn their reputations. Subject of course to the strict constitutional limitations in those cases.

HECHT: If this had been labeled satire, would you have much of a case?

WHITTEN: I think if the publishers of this story had labeled it satire, indexed it as satire, rather than calling it news, putting it in a section of the newspaper reserved by their own admission for hard-hitting news stories, so they've told the reader that this is a news story, a serious news story.

BRISTER: But if you turn to the article and it says my baby came from an alien, that all goes out the window. If it's obvious from the article it's not news it doesn't matter.

WHITTEN: If it's so obvious that the court can determine as a matter of law that a reasonable reader could not take it as fact, that is correct.

BRISTER: Isn't this that obvious?

WHITTEN: No.

BRISTER: When the judge says you know it's time for us to overreact. I mean when a person uses the word overreact they are saying it's time for us to act unreasonably. That's what the word overreact means. Why would any person in their right mind say it's time for us to act unreasonably?

WHITTEN: Because if you look at the press and their portrayal of judges and lawyers this day in time, there's an expectation...

BRISTER: That judges will act unreasonably?

WHITTEN: Yes. I think there is. So to say that this is a matter of law is so obvious that no reasonable reader could believe it to be a report of actual events, I don't think the court can make that determination.

BRISTER: How many 6-year olds are you aware of that are familiar with Salinger?

WHITTEN: Not too many. But according to Mr. Williams in his testimony, I asked him about why they used a 6-year old? And he didn't have any particular reason. I said well can you conceive of circumstances where a 6-year old might be brought into the juvenile justice system? And he pointed out the case in Michigan that was well publicized where a 7-year old was prosecuted for murder. And that kind of stuff had been in the news. For a jury to say that because it's a 6-year old, I don't know how many of the readers are familiar with Salinger. He wrote one good book and that's about it.

O'NEILL: Well you don't think the picture of the child with the stuffed animal and it says Be Afraid of This Little Girl, that doesn't immediately show you that it's satire?

WHITTEN: It shows me that they thought they needed to put a picture of a real little girl to make it look more real than it really was. And apparently the reaction of the readers, and not just

that...

BRISTER: But I had a baby with an alien always have pictures of the alleged ____.

WHITTEN: That's true. But typically if an article appeared on the front page of the Washington Post with a by-line by Bob Woodward, would it be more believable than it would be in the National Enquirer? But this was written by Rose Farley, who won a Katy award for her hard hitting journalism. She had never written a satire before. The readers of this publication that was familiar with it thought she covered news stories.

WAINWRIGHT: Do you believe that published satire is always defamatory, or some times defamatory? I'm not sure I can tell.

WHITTEN: I think it depends on the test that we lay out, the 4-5 prong test, as to whether it can be taken by a reader as a report of actual fact. In preparing for this argument, I tried to think about what questions is the court going to answer me. And then I said what have courts asked before? So I went to the information about the Hustler case and got some questions that the SC asked the lawyer for Larry Flint and Hustler Magazine defending the 1st amendment in that case. And among the things that were asked by J. White. Would this be a different case if a jury had found that the allegations could be considered factual? And answered by Allen ____, who is a noted 1st amendment lawyer, said it certainly would be a different case. And I think that if a jury could find that this article to be an account of actual events, this case goes to the jury.

PHILLIPS: I'm a little confused as to whether you disagree with the legal standard that the petitioner presented. That is reasonably capable of a defamatory meaning. Do you agree with that?

WHITTEN: I agree with that.

PHILLIPS: There has to be some evidence that the writer reasonably could have foreseen that a reasonable reader would have that reaction. What do you say to that?

WHITTEN: I don't agree with that part, because that's an expansion of the New York Times doctrine. New York Times says if there is a false statement of fact that's defamatory...

PHILLIPS: So if you're writing a satire, then anytime you do that you're putting it on the line that a judge down the line could say that that was reasonably capable of a defamatory...I assume that is by a reasonable reader...

WHITTEN: You could, and that a jury might find the same thing, which is why you better write it in such a fashion that they won't. And that's what these folks failed to do here. But they knew what the law was. They knew what the New York Times standard was.

PHILLIPS: You're only defense is, is it reasonably capable of being understood as defamatory?

WHITTEN: I think if you publish a false statement of fact that's defamatory about someone, and that is reasonably capable of being understood by a reasonable reader as being factual, then that is libelous whether you put it in a satire or the driest essay in the Law Review.

PHILLIPS: I suppose the same rule applies for people who say ironic things or attempt to be funny. They need to preface that with I'm going to make a funny statement.

WHITTEN: Part of it's contextual. I notice amicus filed a brief and they listed a bunch of articles from the Onion. Well if you know anything about the Onion everything in the Onion is satire. It's false. There's nothing true in the Onion. Anybody that reads it knows that. That's not true about the Dallas Observer. So context is vitally important.

PHILLIPS: So if you have a well known reputation as a person that speaks in irony, you may be alright. But if you're just trying it out.

WHITTEN: I think Art Buckwall has to probably take less care than George Will.

SMITH: But there is evidence that they published satire before. Is that true?

WHITTEN: I don't think so. They testified they never produced...

SMITH: So this is the first satire piece in the Observer?

WHITTEN: They said they did, but I haven't seen it. They said they did something about Ross Perot, but if it's in the record I - I don't believe it's in the record.

SMITH: Is it your understanding that 2% of the people have to misunderstand it, or is it something like 10%, or is it half the average people have to pick - I mean because everybody is not going to be fooled by this.

WHITTEN: I think that that is the ultimate jury question. It is what a reasonable reader would believe.

PHILLIPS: So if any reasonable person might have been fooled by this, you get to the jury. I'm a public official and I turn on the radio driving in and they are talking about this like it's real. I'm to a jury. The judge has an easy job here.

WHITTEN: I think so. I think in this case he does.

PHILLIPS: One reasonable person.

WHITTEN: I don't think the number of persons is necessarily dispositive. But I don't think on the other hand to get to a jury I have to go out and do a public opinion survey and take a unbiased cross sample of people that read it and find out. I think if I bring people in to trial who - for example a lawyer that I know that's a pretty smart guy, heard it, read it, believed it, was outraged by it, that would be one of my witnesses. And that's the kind of evidence from which the jury may consider in determining whether a reasonable reader would have believed it. But ultimately they are going to have to read the article, consider the context...

O'NEILL: But how do you get over actual malice? The author then says, well it's clear to me a 6-year old quoting Twain and Salinger and all these things are so outrageous. It's just clear to me no one could do this. Okay. You've got some people who did believe it but I do not believe it could happen. So how do you get over the actual malice piece?

WHITTEN: I think you look at the context. You look at the fact that they labeled it news. You look at the fact that it was written by an award winner investigative journalist. You look at the fact that they put a picture of a real child there. This case is not like Dworkin(?). Dworkin(?) was a cartoon about this lady. People know cartoons are not real. If you see an editorial cartoon you immediately say this is somebody who's poking fun at an individual for something he or she may have done. You don't know that by reading this article.

O'NEILL: You're saying then that putting the news monitor on it and using the reporter who had not done satire before is circumstantial evidence that contradicts the author's subjective intent?

WHITTEN: Absolutely. Plus the subjective intent - they are saying we didn't publish anything false because we didn't intend anyone to believe it. That's their argument. The New York Times doesn't say anything about that. It says if you knowingly publish a statement of fact that you know is false, and that it's reasonably capable of defamatory meaning, you have violated a standard. And that's what they did.

Forty years of New York Times law. If it's going to be changed, I don't think it should be changed by this court. That is the standard that we need to follow.

In the Hustler case, which is the closest thing we have to this, Mr. Isenman(?) was asked - says alright. Include that. And then you say parity or opinion about a public figure is never actionable even though it's done intentionally for the purpose of causing emotional distress. Answer: And even though it contains nothing that could be understood as a false statement of fact. Including that, I agree. Yes. That's my proposition. You cross the line when you say something that can be understood as a false statement of fact. That's the defender of the first amendment in the Hustler case. And I think that is absolutely correct. That's where they crossed the line.

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REBUTTAL

HEMPHILL: The plaintiffs in this case are taking a truly extraordinary view of actual malice in cases of fiction. Their position is, if it's fiction there is actual malice. Period. End of story. Whether it's a novel, whether it's a nondocumentary movie, whether it's a political satire, whether it's political commentary, because their position is if it's fiction it's false. You made it up. You knew you made it up. Therefore, you're acting with New York Times' actual malice. That's not the law. A lot of courts have grappled with this issue. Not a single court has held that.

HECHT: Does it matter that they got threatening letters, e-mails, phone calls?

HEMPHILL: No. I don't think it does for two reasons. One, there is nothing in the record to show that the authors of those e-mails and letters read the entire article in context.

HECHT: Do they have to?

HEMPHILL: Yes.

HECHT: Why is that?

HEMPHILL: To evaluate whether a publication is reasonably capable of a defamatory meaning you have to consider the entire article.

HECHT: So a newspaper can write any headline. They can write Hecht a known crook, and in the last sentence of a 30 page article, they say well that's not really right.

SMITH: Or on page 1, you have two paragraphs that are terrible, and then on page 30 that nobody gets to is the rest of it that puts it in context.

HEMPHILL: First of all headlines might be an exception because there are headline cases.

PHILLIPS: I just find this a remarkable proposition that you have to read an entire article before you are a reasonable person.

OWEN: You've got a headline here that purports to be factual. So if that's all I read, that appears to be factual.

HEMPHILL: Two answers to that. One, I don't believe that this is a headline case. I believe that what their complaint is, is the entire context of the article gives a false and defamatory impression that they actually threw a 6 year old girl in jail for writing a book report on where the wild things are. And two, I believe the situation that the article sets up, that situation a 6 year old girl being thrown in jail for a violent book report of Where The Wild Things Are, is inherently improbable.

OWEN: In the Hustler case, the jury was permitted to decide whether the article was

reasonably capable of being taking as fact. And they said it was not.

HEMPHILL: Correct. And I'm not sure that the TC judge was correct in submitting that to the jury. But the TC did submit it to the jury. And that it was not an issue at the SC as to whether...

OWEN: I'm just saying in that case the jury was allowed to decide that question.

HEMPHILL: Yes. The jury was allowed to decide the question. I would not concede that that was a correct...

OWEN: Would it ever be permissible for a jury to decide that question?

HEMPHILL: Sure. Absolutely.

OWEN: What facts in this case would make it permissible for the jury to decide?

HEMPHILL: The content of the article needs to be different. The fictional quotes attributed to the plaintiffs and others would need to be believable instead of inherently outrageous. Our position is, as J. Brister said, that these quotes are inherently on their face incredible, unbelievable, and obviously fictional. The label Goof as an acronym for a religious organization couldn't be in there. A 6 year old, first grader couldn't be talking about _____ Salinger. If the content of the article were different certainly it could be a jury question. I'm not saying it's never a jury question.

HECHT: Would there be judicial review of that - a de novo type of review that you have with actual malice or not?

HEMPHILL: I believe there would be an independent judicial review. I don't know that it would be a clear and convincing standard on review as the actual malice review standard is a independent review of the entire record, employing fair and convincing standard. A jury's finding on reasonable, capable of defamatory meaning, I don't believe would be subject to clear and convincing.

SMITH: With regard to context. I assume we agree that if it was in the Onion or the Wall Street Journal that would be different. So the Dallas Observer, what's in the record regarding whether or not this is the first satire ever published, with what regularity is satire published and where is it placed in this magazine, so that if I am a reasonable reader, and I pick it up do I expect to see this every third or fourth issue, or is this the first thing I've ever seen?

HEMPHILL: There is an explanation of that in the affidavits of the three individual defendants which are attached to our principal brief. They testify that there is a regular feature in what was then called the news section. It's called the city section now. There's also testimony that on previous occasions there had been satires and parities. Every third or fourth issue? No. I don't

believe there is any record evidence that it was that frequent. But I believe the only record evidence of whether this was ever done or not, whether satire or parody was ever used in that news section before, the only record evidence is yes, that it was.