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Supreme Court of Texas.
FREEDOM NEWSPAPERS OF TEXAS, et al., Petitioner,
v.
Conrado M. CANTU, Respondent.
No. 04-0115.

January 25, 2005

Appearances:

John A. Bussian III (argued), The Bussian Law Firm, PLLC, Raleigh, NC for Petitioner.

Larry Zinn (argued), Law Office of Larry Zinn, San Antonio, TX for Respondent.

Before:

Wallace B. Jefferson, Chief Justice, Priscilla R. Owen, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, Justices.

CONTENTS

ORAL ARGUMENT OF JOHN A. BUSSIAN ON BEHALF OF THE PETITIONER

JUSTICE: The Court is ready to hear argument in 04-0115 Freedom Newspapers of Texas v. Conrado M. Cantu.

SPEAKER: May I please the Court. Mr. John A. Bussian will present argument for the petitioner. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF JOHN A. BUSSIAN ON BEHALF OF THE PETITIONER

MR. BUSSIAN: May it please the Court. This last standing decision by the Court of Appeals [inaudible] would have trial judges apply summary judgment rules in a way that exposed the headline and lead paragraph in each rival. [inaudible] of the jury trial and almost every [inaudible] by the Court.

JUSTICE: We've been down that road

MR. BUSSIAN: I'm well aware of that.

JUSTICE: So, you're asking to overrule our case law.

MR. BUSSIAN: I'm asking - Herald is asking, Justice O'Neill, that not only the Court of Appeals decision be reversed in this case and some of the judges [inaudible].

JUSTICE: Well, let me -- on the point you just raised. You ask us to reverse even though we visited this before. You want us to overrule this case. We have to do what you say.

MR. BUSSIAN: I argued the state law is that under the current law, there's no triable issue of falsity or actual amount to it. And that --

for that reason alone, based on -- certainly the reason decisions had been decided by this Court in Forbes and Isaacks in particular that whatever confusion may have reigned in the Court of Appeals' minds, that led us to find a triable issue of actual malice had certainly been laid to rest. So, if I [inaudible] this Court doesn't have to do anything more than apply the analysis that's already been there, to find that summary judgment should have been entered in favor of the paper in this case. But, yes, your Honor.

If the policy under the line of statute by which an appeal was taken to this Court in this case is to be given its full effect then an adjustment to the rules by which summary judgments are decided, at least in cases involving the falsity of headlines crafted by the brave souls who toil on copy desks and newspapers around the country and make word choices about how to describe ambiguous, what I call, [inaudible] on the campaign trail. It needed to be adjusted so that there's protection against these cases being tried to juries where there is no basis for doing that. And this Court, in the last five years, has been patient to consider the claims of public officials in almost a half dozen cases and has parsed out evidence in the record to try to make the right [inaudible] call on whether these cases are to reach jurors.

And in four out of five that I know of this Court ultimately concluded those cases shouldn't go to juries or shouldn't involve any claim or disputes whether question was asked [inaudible]. And yet we're back here again. So, our position is that the Court of Appeals decision, one in particular, talks about the plaintiff's contention that the headline read in context of this entire October 5th news report as false. This is more established when it talks about using a reader's poll essentially to raise an issue of falsity. This is not the kind of call as this Court has recently described in decisions as recently Isaack that -- that allow that sort of evidence to raise a jury question, falsity, actual malice, or otherwise in the context.

JUSTICE: Interesting thing here is, the first line, really, is not true. I mean, the constable did not say what to reporters here have said, having here - see, no Anglo can ever be sheriff. Cantu said, let's do that. That is not true.

That's what the reporter thought he said, which certainly one could understand, well you said the doublespeak -- amicus uses code language -- certainly as you were sitting there, you might think,, this is just a proxy for [inaudible] but it's the idea [inaudible]. But it is not true that he said it.

MR. BUSSIAN: And you're right, Justice Hecht and we never took the position, we think, in a way we punctuated the story, the headline in particular. We were trying to deliver a message to the reader that this was a direct quotation. Had we done, we would have used quotation marks. So, therefore, we're not claiming that it was and that's where we get into the need that Justice Stewart in the US Supreme Court's decision of the time being [inaudible] said, "Now, determining proof in a context like this. It doesn't wind itself very easily. The usual task is a fairly complicated stuff, when you take a look especially at the transfer of the debate of the call of library in Brownsville between the two candidates in this case.

About how full of double speak it is and how ambiguous it is. There has to be a different task applied to that. Otherwise, it's too easy to find a triable issue of falsity. It's too easy to say that's not substantial [inaudible] in this case that [inaudible] may be made under the current rules because we told the readers. If you read that into the story, and what and use what quotation marks. Here's what the

sheriff did say

JUSTICE: Well, it may be double speak. I mean there's an argument that way, but could be -- I could -- shouldn't the reporter have understood this to be, "I am bilingual. I can speak, you know, this is the Spanish term some people speak. You know, only Spanish or mostly Spanish and has nothing to do whether I'm white or not, you know, Anglo or not, it's just that I can relate to the people who -- the department would serve.

MR. BUSSIAN: I agree, Chief Justice Jefferson that that characterization could be [inaudible]. And for reasons that the time be paid for profound rational interpretation to be the task in a case like this. Bilingual would fit within the [inaudible] of rational interpretation but so would [inaudible] to the sheriff.

JUSTICE: [inaudible]

MR. BUSSIAN: There has to be -- you have to have that flexibility or you're gonna be second-guessing words here and

JUSTICE: And you're here to argue that the first amendment for text, the most querulous reading a reporter can put [inaudible] with. You put in the headline so you sell the papers.

MR. BUSSIAN: I would say there's a point Justice Brister. After which, you're no longer in the realm of rational interpretation. If we had said in this case, because there are other things reported in the article that the sheriff accuses his opponent of buying off the Texas Rangers to investigate. Then maybe --

JUSTICE: But as long as it's a possible interpretation, the newspaper can choose to -- uses the headline the worst interpretation, the one that takes or stir up the most controversy and that's protected by the [inaudible].

MR. BUSSIAN: If it fits a rational interpretation [inaudible] then we think that it does --

JUSTICE: Let me ask you this.

MR. BUSSIAN: Then yes.

JUSTICE: Constable Cantu showed himself a racist last night in the debate at the Brownsville Library. Would that be a rational interpretation? That's what I advise getting at.

MR. BUSSIAN: If the reporter had --

JUSTICE: Had pretty stuff --

MR. BUSSIAN: That's pretty stuff. And I think in the Rawford Tumble political campaign for Add Life, that sort of characterization interpretation of candidates' remarks has to be tolerated. Otherwise, we're [inaudible].

JUSTICE: Well, it may be tolerated in the sense that that's what I think he said. And I can defend that happened. But it's another thing you say that would [inaudible]. If we're dealing with substantial proof, it seems to me that that would be some reasonably objective standard and opinion and all the stuff that we're gonna protect, otherwise, that's fine but it's the truth.

MR. BUSSIAN: The truth is the truth in a lot of settings, I agree, Justice Hecht, if we recorded that an earthquake rocked the valley then that's -- I mean, that's a direct account of an event that can be observed. If you're trying to interpret what somebody said in the ways in which how the policy issues were debated in this country is not so simple and the time being paid for and went to great lengths to say, "You know, determining proof in this setting, you know, isn't as easy as that." We got to come up with this task that gives more room for news reports of what people are trying to say -- is said in press conferences. In that case, in a civil rights commission report and the

like. And if we don't have the bandwidth at that and that's the shape -
- we're gonna make copy editors constrained pretty much to play it safe
and let's just put in the headline exactly what the candidates have.

JUSTICE: Well, I have lots of protection with [inaudible].

MR. BUSSIAN: It's another layer of what we have to go through in
all these cases and what this Court has so patiently done for a number
of years now. And that is, that the first line of defense falls away
[inaudible] cases. So when the [inaudible] out a record about whether
there's enough or legally sufficient evidence of [inaudible] to get to
a jury and almost invariably, this Court and other Courts likely
conclude that it doesn't cut the [inaudible] and then, we spend a lot
of time getting care, finding out that the public officials had no
actionable [inaudible] of plan and we're back to start another one on
the long road here again. And so, yes, the [inaudible] view, we think
the current rules protect what it did very clearly. The summary
judgment -- should've been motion -- should've been granted.

But in order to give a full effect to the public policy interest
that support the statute that allows this appeal to be made from a
denial to a summary judgment and some adjustment in the current rules
ought to be made so that you're not litigating these clients over and
over again at great cost to the litigants and [inaudible] judicial
resources [inaudible]. So, there are those points were made that --

JUSTICE: Why can't you use an expert? You say, because its
subjective, but we use -- experts testify in the courts everyday in
Texas, about what the husband was thinking, [inaudible] mother or not,
or she's actually [inaudible] treat the pending criminal cases, they
come in and one noted expert, now deceased, I think he's deceased,
testified in every case that -- I've looked at the defendant's record
and he's gonna do it again.

MR. BUSSIAN: Well, maybe, we'll get to day one and someone will
conclude that there is pathology there in the way that these reports
were put together --

JUSTICE: Could you testify -- I've read all these reporter
stories. I've changed resume, talked to him a couple of times and I
think you have actual [inaudible]

MR. BUSSIAN: I think this is fundamentally different, Justice
Hecht, and that we're asking or the claimant is asking an expert to
divine whether somebody believes truth or falsity. And the task is that
there has to be some evidence of knowledge that it was false report
that was published. And that sort of thing simply defies the abilities
of experts to get inside a mind and talk about it

JUSTICE: Well, [inaudible] so but what about actual Mills?

MR. BUSSIAN: The task for determining whether you got actual
balances, as you know, Justice Hecht is, whether or not there is a
serious doubt about the truth of what's being [inaudible] and in order
to do that, you have to get inside the minds at the time of publication
and to know the problem with the way that the Court of Appeals analyzed
this. You have to get inside the mind of the publisher at the time of
publication and find out if that has existed. As the Court knows,
[inaudible] that only where there was pretty clear and direct evidence
that there was that doubt and it was expressed before the broadcast.
Could that, in combination with some other factors, even come close to
create [inaudible] but here, we're not anywhere near that.

JUSTICE: Thank you.

JUSTICE: The court is ready to hear argument [inaudible] from the
respondent.

SPEAKER: May it please the court, Mr. Larry Zinn for the argument

and the respondent.

MR. ZINN: May I please the court. I first like to focus on what we believe the questions the Court should ask itself [inaudible] substantial proof and [inaudible] because there some dispute over actually what the test is for both of [inaudible]. On substantial proof, we think the question [inaudible] what is the gist of the argument The second is, what is the truth? What was actually said? The third thing is, does that gist differ from the truth? And the fourth thing is, if it does, is it more detrimental to the reputation of Sheriff Cantu and the [inaudible]. We think those are the four questions that stick to substantial truth regardless of whether you think this is a direct quotation, a paraphrase or whatever.

JUSTICE: Newspapers are not required to publish, re-publish the debate quote-for-quote info.

MR. ZINN: No, but --

JUSTICE: So, they're gonna have to give a gist of what happened to the debate

MR. ZINN: Yes, but they didn't do that.

JUSTICE: Well, if -- and that's because the term bi-cultural cannot be interpreted by a reasonable hear to be called for non-Anglo.

MR. ZINN: Well, their witnesses admit it that it is a positive term and that it is not a code word essentially. This code word, by the way, appeared for the first time in the replied brief on the merits before this court and [inaudible]. That's the first time they claimed that these were code words. But in any case, there are witnesses --

JUSTICE: [inaudible]

MR. BUSSIAN: Bi-cultural was a positive conclusion term and not -- and essentially not as [inaudible].

JUSTICE: But what if the reporter was simply mistaken on that [inaudible]? I just [inaudible], you're probably right but I didn't appreciate the distinction and so, "whoosh, woops", they can stay," how do you get beyond actual event [inaudible]?

MR. ZINN: Well, that's not the record in this case because the reporter appears -- testified that he was asked, quote by quote, from [inaudible] to him. And he said that it was a positive term. And in fact, it was positive attribute for somebody to have whose running for sheriff of Cameron County. It was an inclusive term and that after debate, he didn't Cantu was racist. Yet, he wrote the headline [inaudible] and said the exact opposite.

Now that some evidence won that it was not the substantial truth and second, that some evidence could be that he had serious doubts -- did not know that what he was writing wasn't true.

JUSTICE: Well, but -- and couldn't he have used any race instead of Anglo. Didn't you say, "No [inaudible] because that's not bi-cultural. Whatever it is, it's not bi-cultural, Anglo. The connotation of that term is that it's not bi-cultural. Does it always have to be a racial epithet in some way?

MR. ZINN: Well, no. Bi-cultural in the abstract, it could be a German-American. It could be any kind of American. So, or could be any -- bi-cultural is not limited to Hispanic and Anglos, I mean, it sticks to any two cultures.

JUSTICE: But in this context it was.

MR. ZINN: Right, in this context, we're talking about ...

JUSTICE: And in this context he was the majority race.

MR. ZINN: Sure. And it --

JUSTICE: And if the shoe was on the other foot, this was somebody white in Houston saying, "I'm more inclusive. I'm more broad-minded. I

know more people in the community than this minority black person." We wouldn't stand for that first. A newspaper would scream and howl about that, wouldn't they?

MR. ZINN: Yes, but that's not what Conrado Cantu said. He said in order to go up in neighborhoods and understand what's going on, you need to be bi-cultural. And you need to understand what bi-cultural means in a way. [inaudible] museum, that's called the bi-cultural museum. Bi-cultural has a meaning and it's not the meaning that the reporter put on it and their own witnesses admitted that that's not the meaning, that they understand it to be and Conrado Cantu testified that that's not what he meant. He meant the meaning that the newspaper people testified it means. It is a positive inclusive term. If you allow the newspaper to print what a candidate said, based on what they believe a code word means in politics. You have open season on political candidates and you will, instead of opening and [inaudible] Robus debate and Oldman --

JUSTICE: -- a long time and that's what --

MR. ZINN: -- different --

JUSTICE: Talking code words, don't they?

MR. ZINN: But it serves a difference here. If the paper had written, and [inaudible] that said, "We think Conrado Cantu is using code words and he's racist." They could do that. If they wanted to report that his opponent, Terry

JUSTICE: Conrado Cantu was using code words and he's a races. Take it do that. If they want to report that his opponent Terry Vinson thought that Conrado Cantu is using code words and was a racist, they could do that but they can't take the words of the opponent. They can't take their own opinion and put that into words of the candidate.

JUSTICE: Judge Brister had a, I think, had a question. Well supposed I'm [inaudible] against Justice Jefferson in a precinct and I say, "I am a lot more like you are. I think more like you do. I had more common experiences than you did in my opponent." I think, the next day, the headline would be that I'm a racist. I didn't use any word that's bi-cultural. I just said that I understand more. But in context, don't you think that that will be the headline and do you think I would have [inaudible] cause of action?

MR. ZINN: No, the headline would be [inaudible] "I'm a racist." And then they lead us to pursue --

JUSTICE: No, the headline would be --

MR. ZINN: -- debate yesterday than she [inaudible] --

JUSTICE: A black can't represent [inaudible] as well as a white.

MR. ZINN: Okay. But that wasn't the headline here. If a reasonable reader, that's the test here, a reasonable reader would look into this article. It wouldn't know that the lead and the headline was based on simply Conrado Cantu is [inaudible] saying that he need to be bi-cultural to understand what's happening in the neighborhood in Cameron County which is 85 to 90 percent Hispanic. I mean everyone admits that you need to be [inaudible] that it's a positive attribute for a candidate in Cameron County to understand what's going on in all the neighborhoods which are predominantly Hispanic. And in order to do that, in order to understand all the communities in the neighborhoods in Cameron County, you have to be bi-cultural.

JUSTICE: And therefore, if you're not bi-cultural, you can't be a sheriff.

JUSTICE: Right.

MR. ZINN: He was saying that that's a quality that you need to have as a sheriff. Just like [inaudible] quality --

JUSTICE: Isn't there a logical implication that if you don't have that quality, you shouldn't be sheriff?

MR. ZINN: Yes but, but that's not what they said. They didn't say they made the lead to race and said, "Nobody who's Anglo can be sheriff." They didn't say Conrado Cantu implied that Terry Vinson shouldn't be sheriff because he's bi-cultural. The headline was, "No Anglo can ever..." I mean the lead was, "No Anglo can ever be sheriff for Cameron County," meaning that no Anglo in Cameron County can ever be bi-cultural by definition. And that is not what he said, and it's not what he meant. And even if you say to paraphrase, that's not the meaning, both by what Conrado Cantu testified too and by the newspaper's own witnesses.

JUSTICE: A writer can write something that is not essentially true and still not have actual malice intent. Sure. So why does -- why is there actual malice here? [inaudible]

MR. ZINN: Well, for several reasons. First, it must decide what test to apply by actual malice. And to do that, you are gonna have to make a determination about whether this is a direct quotation or the equivalent or just a paraphrase. In other words, you gonna have to decide whether the [inaudible] test applies but if you think that a reasonable reader would think that what was reported in their mind that Conrado Cantu actually said would take [inaudible] he said, then Masson test should apply and then that's gonna be a deliberate alteration test. And then if you find that the deliberate material alteration which is really just a transfer of the substantial truth test what they did in Masson, the transfer of that substantial truth tests actual malice because when a reporter does a deliberate material alteration of a quotation of what somebody said, they obviously had known what they were doing.

JUSTICE: Well, but you may think -- you're correcting, you're just putting in another word.

MR. ZINN: Well but if you change -- that's true.

JUSTICE: You might not think --

MR. ZINN: And it could say -- if it has the same meaning? That's fine. But if it doesn't, under Masson, then that's evidence of actual malice. Now, if you believe that the Masson test doesn't apply then you can look to several factors and then the test becomes the Old Sullivan test of did they have knowledge of the falsity or did they have a serious doubt as to its proof or high degree of awareness of the falsity incurred and you can look to several things. As I said before, Pierce testified that what he understood the term bi-cultural to mean was a positive inclusive term and that it was a positive trait to have to be sheriff for Cameron County. And he also testified that after the debate, he didn't think Cantu is a racist but the article he wrote portrayed him as such.

Now, that's evidence that Pierce knew that that leap he was making from bi-cultural to racism was something he knew wasn't true. That there is certainly serious doubt for a high degree of awareness that he changed that meaning --

JUSTICE: I'm sorry --

MR. ZINN: [inaudible] purposely.

JUSTICE: -- [inaudible] the word racist is not used anywhere.

MR. ZINN: But that's the effect of the headline.

JUSTICE: Could a person believe that it would be better to have somebody who represents the whole community without being a racist?

MR. ZINN: Well sure.

JUSTICE: So, why is it we're so sure the article calls him a

racist?

MR. ZINN: Well, certainly that was the reaction of hundreds of voters to this argument.

JUSTICE: Well we can't, I mean, we can't hold them liable for what they believe.

MR. ZINN: Well --

JUSTICE: What's -- everybody may end up believing the newspaper said.

MR. ZINN: If your Honor, please, I don't think this is complicated. When you look at the headline in lead it says, "No Anglo can ever be sheriff of Cameron County."

JUSTICE: Well, you look at --

MR. ZINN: When you say that somebody can't do something simply because of their race or ethnic background, I believe that's the definition of racism.

JUSTICE: Let's say if I said that, if I said Cameron County's 90 percent Hispanic, it makes sense to me that the sheriff should be Hispanic in Cameron County. That's look different than if I'm the Hispanic saying that, doesn't it?

MR. ZINN: Yes, but that's not what happened here. He didn't say that anybody who is excluded because of their race or ethnic background. He said you need to be bi-cultural, that is the quality that a sheriff should have to be sheriff of Cameron County. And frankly quote the defendants and plaintiff agreed that that is true. In fact, the reporter who wrote this article believes that. But that's not what he wrote. And so, I think that has some evidence that in fact, if not, and I don't know what standard or [inaudible] you're gonna apply here, but even, I think under any stand, that is evidence of actual malice but there is also other evidence.

You also had the testimony from the editor, George Cox, who testified that he reviewed the transcript and that he didn't think Conrado Cantu gave any impression that he was discriminatory against Anglos in any way. And that he also agreed [inaudible] was an inclusive term, a positive one that referred to diversity and was not a negative exclusive one. The portion of the paper [inaudible] testified that he himself considered himself to be bi-cultural. And I didn't think it was an exclusive -- exclusionary term. So, you have -- throughout the hierarchy of the paper, a question -- you talk about undisputed evidence when you apply the clear and convincing evidence stand. But there's undisputed evidence about what bi-cultural means in this record in this record and it's a positive inclusive term.

JUSTICE: If the three newspaper witnesses also testified that the headline was a negative [inaudible].

MR. ZINN: No, they defended their headline and their lead. But we can't be prisoners of what they say. Nobody's gonna admit we screwed up and we change the meaning and [inaudible] it. But, you know, we have to be able to look at what they know about those words. And they testified to what those words meant to them. And that's not [inaudible]. And Conrado Cantu testified to what those words meant to him and what he was -- and that's not what they wrote, and they knew it. This is a deliberate alteration. So, even if you don't apply the Masson test, he still acknowledged to the falsity or certainly a high degree of [inaudible] and there are other things --

JUSTICE: [inaudible] we're only talking about the headline, right?

MR. ZINN: Well, no, the headline and lead.

JUSTICE: Because, on the issue -- I mean, as you read the article, it becomes clear what they drew the headline from. So, they read the

whole thing. You can tell that it really is a reporter's spend.

MR. ZINN: Well, I'm not so sure. I mean I disagree with that but actually, I would look to the newspaper's testimony themselves [inaudible] as to what the headline lead meant. And the testimony from the Steve Sinclair the Night City editor who wrote the headline, George Cox, the editor and Daniel Provocisthe publisher, is that that headline represents the summary of the story. In fact, the men who wrote the headline, Steve Sinclair testified that that headline was the essence of the story.

JUSTICE: Well, but isn't that true, I mean, I've seen a lot of headlines where I read the article and I realized the headline really is ...

JUSTICE: It's in the same sense as new time, for example, I mean, you've read the headline and then it seems then [inaudible] would be all the way but then you read the context, you read the stories from beginning to end, it becomes clear that its satire [inaudible] and [inaudible] why couldn't we analyze this article in the same way.

MR. ZINN: Well, you also have the lead and if the lead is a very powerful part of the argument and the lead, in fact, Steve Sinclair, the man who wrote the headline, said that the lead was, quote, the gist of Cantu's statements, quote.

JUSTICE: But the article, Cantu captured what was said at the debate, and one thing that was said at the debate was, quoting the article, Cantu's opponent said bi-cultural is a barrier. He did not take bi-cultural to mean a positive statement at the debate. And he clearly took bi-cultural to mean something negative in the context of the debate. So if the report of this, about the tone of debate, what happened at the debate, how is this, ah --

MR. ZINN: What you can't define about what Cantu says and about what his opponent thinks.

JUSTICE: But if you're covering the debate and you're covering what was said at the debate, what was taken away from debate by some people, he said, "This is what Vinson took away from me." And that was accurate, wasn't it?

MR. ZINN: True. And as one thing the reporter did Vinson think is, it's another thing to take what your opponent thinks and put those words into your mouth, as a candidate. I mean, at the Bush-Kerry debate, you can't define what President Bush says by [inaudible] the supporters are saying. I mean, what President Bush says and means is what President Bush says and means. If we allow newspapers to define what a candidate says, by what his opponent thinks, then it would always be the most negative false thing. You cannot -- you would be undermining the political process. It's one thing to report what an opponent thinks. It's another thing to take what the opponent thinks and put those words into candidate's mouth.

JUSTICE: Well, if you had the headline said, "Bush: Weak on Defense." Did we take that as a quote that Bush says he's weak on defense or do we take that as something that someone had said about Bush in some sort of political context?

If it says "Bush: Weak on Defense" then that's something George Bush said. That's what that means. Not that "Kerry: Bush, weak on defense." If it says, "Bush: Weak on Defense." That's George Bush saying, "I'm weak on defense." That's what that means. And that's what the paper testified to. They didn't say, "Vinson: Cantu Is A Racist," or "Cantu thinks: No Anglo should ever be sheriff of Cameron County." They wrote, Cantu colon. This is me. Cantu is saying this. And they followed it up with the lead and that lead was powerful. That lead got

your attention and Justice O'Neill, I disagree some because I think you've read the article, a reasonable reader would not know that the term bi-cultural is what is what the reporter is equating with that headline lead.

JUSTICE: But if the headline said, "Cantu is a racist," that would be apparent. This is not another [inaudible] and something he'd said but as you read the article, you can say that that's really not true. You can make that assessment yourself but my understanding is that the falsity your aiming at is the newspaper says he said it.

MR. ZINN: Not as a fact story on the front page of the paper about what happened at the debate. They ran the headline, "Cantu is a racist." That is a powerful line.

JUSTICE: But what if they had said, "Cantu: Racist," and then in the body of the article [inaudible] Vinson virtually called Cantu a racist, when he said bi-culture's a barrier, that it's there because people put it there and then had some sort of story that the headline was, "Cantu: Racist."

MR. ZINN: Well, I mean that's a weaker case, I guess, for the plaintiff because the body of the article explains why Cantu is being called a racist.

JUSTICE: [inaudible] matter that Cantu ultimately won this contest?

Excuse me?

JUSTICE: Does it matter that Cantu ultimately won this contest.

MR. ZINN: No, and in fact, it was so close, there was a recap [inaudible]. It was a very close election and the evidence shows that after this article came out, Cantu's campaign got a lot of animosity toward it and it became a much closer campaign. And that was reflected on the final vote.

JUSTICE: Thank you Mr. Zinn. Any further questions?

MR. BUSSIAN: This was in a headline and the lead in [inaudible]. Mr. Vinson was [inaudible] showed Cantu was running against the [inaudible]. So, certainly, he started the proposition with the choice of words fits the race, the race where the office that the two were vying. And again, I think it is important to adjust the [inaudible] to read down and find the direct quotations in the story, the things that signal, this is what Cantu actually said. It is not the way it's being re-defined here that the use of the colon is tantamount to the use of quotation marks. That's what Sheriff Cantu would have you do but it's not the way that newspaper journalism is operated nor could it. And preserve that flexibility [inaudible] for free expression [inaudible] discourse of this country.

So, if you read down in the article looking at key things, of course, our direct quote, how are you gonna relate to this people? And if don't work among the people that count, what good is experience? So, again if you compared those direct quotes with what the copy editor toiling to come up with a shorthand description [inaudible] space did [inaudible]. It's what was then. [inaudible] with the rational interpretation as a matter of law as well as with any test for falsity [inaudible]. He argued simply that a change of meaning gets you to a triable issue of actual malice [inaudible]. And again, we're then -- we're following back [inaudible] and close to a strict liability [inaudible]. That's the test for falsity and the reason that was developed in the Masson case is because we had a finding in the courts below that the alterations of the direct quotations in that case had occurred. There was a finding that despite the conflict in testimony, the answer is what you said, "No, it isn't." The Court took that as it

should have there and said that there's evidence of alteration. We're gonna start with the proposition that those direct quotes were altered.

Now that we have that, we have deliberate alteration. The question is to get to a triable issue of actual malice. Is it false enough to get you there, to bring the two things together. That's not that we have here and if, of course, you've fallen to the argument that this may --

JUSTICE: [inaudible] is false enough or whether it's false on its face?

MR. BUSSIAN: Well, in the Masson --

JUSTICE: You have little lies, you have big lies [inaudible]

MR. BUSSIAN: That the material change in the meaning is the argument I'm hearing from the Sheriff County and that is a pretty simple task of falsity. I mean it's a pretty low [inaudible] to get an actual malice issue in front of the jury. And if you apply it to a headline and the lead in this story, we think you have [inaudible] official cases. So far, you have many, many more. I mean it is inherent in the nature of headline writing as expressed in the briefs by my [inaudible].

JUSTICE: [inaudible] determine that the headline needs to summarize the gist of a political [inaudible] connection.

MR. BUSSIAN: The intent to inform us is not part of the equation with respect [inaudible]. That would be the question about whether a motive [inaudible] was talked about upon this Court at some length and a number of your recent decisions and notably as recently as a [inaudible] I believe. And it was determined that going back to what you decided in [inaudible] and unless there is a piece of evidence that shows doubt expressed by the publisher prior to publication, you can't act and I don't really like this candidate thread of interview equation and come up with a triable issue of actual malice. It's a motive by itself. It doesn't get you there. And falsity [inaudible] either way they're trying to define it here, is not a test for actual [inaudible] triable issue of actual malice, even if there's bad motive that goes with it [inaudible].

JUSTICE: Thank you for that. The arguments have been [inaudible] morning and the marshal will now adjourn the Court.

SPEAKER: All rise.

2005 WL 6161824 (Tex.)