

**ORAL ARGUMENT — 4/1/98**  
**97-0868**  
**WFAA-TV V. MCLEMORE**

WATLER: I will address two issues on which WFAA-TV was incorrectly denied summary judgment in this case. The first issue is John McLemore, the respondent's status as a public figure, required to prove actual malice in his libel case. The second issue is the truth of the news reports that are at issue in this case.

Let me first address the public figure issue since that's the issue that the Waco CA spent its time deciding. There are two kinds of public figures: All purpose public figures; those that are pervasively known and have some position of prominence in the community; and limited public figures; those are persons who are known in connection with a particular controversy. John McLemore, the respondent here, the plaintiff below, is both kinds of public figures. Without doubt, he is a limited purpose public figure by his actions and thrusting himself to the forefront of the public controversy involving the ATF raid on the Branch Davidian compound in Waco, five years ago in which four ATF agents were killed and 20 were wounded.

ENOCH: Jewell, in Atlanta, reported the backpack that ultimately exploded. And I assume he was interviewed and people asked him questions and did all that sort of thing. Was he a limited public figure for the purpose of having no cause of action for the newspapers that reported him as a suspect?

WATLER: I believe he was a limited purpose public figure at the point that he voluntarily went on network news shows. Mr. McLemore had a similar occurrence here in which he was assigned to cover this raid, and he did cover this raid for his TV station. But he went beyond that and held a press conference and appeared on CNN.

ENOCH: Irrespective of how that person gets involved in the circumstance, the instant that person does anything other than involuntarily appear to talk about that, they become a public figure for the purposes of losing whatever protection private individuals have from false press about them in the absence of malice?

WATLER: Right. *Gertz*, which is the seminal case on public figure doctrine by the US SC, teaches that when a person takes voluntary action in connection with a particular controversy to thrust themselves into the forefront of that controversy, then he loses his status as a private figure. And that's exactly what occurred with Mr. McLemore in relation to this news event.

ENOCH: In the Jonesboro shooting, there is a psychologist who is saying, "It's very important to let victims tell their side of the story, to let them talk about it, it's therapeutic to them." I assume a reporter who wants to come up and start talking to them, they don't have to talk to the

reporters, but they voluntarily do, they were there, they were an eyewitness, they immediately become a public figure for the purpose of no longer being a private individual with respect to the press?

WATLER: When they voluntarily make those statements. And I would point out there is a greater societal therapeutic value that's at stake here, and that's the value that we protect by the First Amendment to have a free and robust open discussion of significant public events. This particular event was one of the most astounding news events that had happened in our time. And there was tremendous controversy over what was the cause of these 4 agents losing their lives when they attempted to serve search and arrest warrants. And it's the protecting of the open, candid and robust discussion related to those issues...

ENOCH: How was that candid, open and robust discussion protected if an individual is discouraged from talking to the media because they would lose some valuable privacy protections?

WATLER: Well I think certainly in this particular case, Mr. McLemore wasn't discouraged. And we see time and time again in well known news events or well-covered news events where the central participants step to the forefront and go on talk shows, write books about it, entertain movie deals, hold press conferences, all of those actions were engaged here by Mr. McLemore. He did all those things that classically or indicia of a person having public figure status. The record here doesn't show that there is any deterrence from people being informed from the participants in these events making their views known and being heard. In fact, that's exactly what the First Amendment protects.

HANKINSON: Mr. McLemore takes the position though that the only reason why he was on CNN and out in the public eye dealing with the controversy was to defend himself against what the various news organizations had done in terms of the accusations, and but for the conduct, he would have not been led into becoming a limited public figure if that's what he is. Would you respond to that?

WATLER: The record is, and it's helpful I think to understand the exact sequence here, this entire event and the news story that's the subject matter of it occurred over a very short period of time. The beginning event was the raid on the Branch Davidian compound, the initial raid that eventually led to the 52-day standoff with the residents of the compound. When Mr. McLemore was covering that raid thrusting himself physically into that raid was on the compound grounds, he then reported live from the scene of that raid, that was the first time that he was on live TV reporting live from the scene. When he left the scene of the raid, a couple of hours after there was a stalemate in place, and when he left the scene of the raid there were any number of other reporters who had come to the scene and at that point he held a press conference. All of this occurred before there was any question raised of what was the role of the media: Did the media tip anyone off? So he is going beyond his own mere job requirements appearing on national TV, talking to journalist, giving

interviews before there is any question raised, and certainly before the subject newscast. Two days later, the ABC news program Nightline devoted its entire show to what went wrong in Waco just 48 hours earlier. And Kathy Fair a reporter from the Houston Chronicle appeared on that show and accurately and truthfully reported that the ATF agents at the scene who had participated in the raid were blaming the media and accusing the local media, those media who were there at the scene at the time that the raid began causing the deaths and injuries to their comrades. And it was the next day, Wednesday, that WFAA, Channel 8 in Dallas, broadcast the report that is the subject of this. So all this happened in a very short period of time. And importantly before WFAA made its broadcast others in the news media, particularly Kathy Fair on her Nightline appearance had raised the issue of whether or not members of the local media were responsible for tipping the call.

ABBOTT: You're not saying are you that every tv news reporter who does a story is a public figure?

ATLER: I am saying that every tv news reporter who has brought a libel action and has the issue decided at whether or not he's a public figure has been found to be a public figure except John McLemore in the decision by the Waco CA. So there's a well-established broad body of law, I believe there are 21 cases that we've been able to located, where reporters and tv reporters, book authors, publishers of newspapers, columnists, people who have various standing in the news media have brought libel actions.

ABBOTT: Let's exclude authors, opinion writers, and stick only to people who report stories over the television media. It seems to be your position now that every tv reporter who does a story is a public figure for the purposes related to that story.

WATLER: For the purposes related to that story, yes, that would be my position, that he is a limited purpose public figure.

ABBOTT: So all of these other issues about how the individual in this particular case may or may not have injected himself into everything that was going on out there is really irrelevant as far as you are concerned. All that matters is that he showed up and talked in front of the cameras?

WATLER: No. Again there are two kinds of public figures: the all purpose public figure and pervasive public figure. What I hesitate on is when you say "every reporter." I think every reporter who is on tv for the period of time that Mr. McLemore was, over 5 years in Waco, 5 nights a week achieves public figure status, pervasive not in relation to a particular issue.

ABBOTT: But that's different than what we just talked about a minute ago. That's why I am trying to set these parameters. Are you saying that a tv reporter who does a story on television is going to be a public figure for the purposes of a subject matter related to that story?

WATLER: If there's a preexisting public controversy that is actually being discussed about that story, the reporter cannot bootstrap his way into creating a public figure status, or the defendant in a libel action cannot bootstrap their way. It's not simply by virtue of the report alone. It's by virtue of the entire existence of a public controversy that the reporter is reporting on that he becomes a public figure. So with that qualifier, I would agree with you.

ENOCH: I understood your comment is what brings about a private citizen to be a public figure for a specific purpose, is simply a voluntary answering of media questions?

WATLER: That would be one example.

ENOCH: So your discussion is it's not a prior controversy of public interest? It is, I report on a story and then for whatever reason there is an interest in that story beyond just what I reported, and I am asked about that by a media, I then become a specific public purpose for any discussions about that event?

WATLER: I agree with that.

HANKINSON: Has the weight of the authority that you talked about dealing with whether news media personnel or public figures determine that most of these people are all purpose public figures or have the holdings been that they are limited purpose public figures?

WATLER: They have been both ways. I would say most of the cases fall on the all purpose public figure end. There is some imprecision among these cases. There is not always a bright line distinction between the two categories. And functionally once a person is a public figure it doesn't really matter if they are limited purpose or pervasive, the same consequences in terms of the First Amendment protection related to actual malice arises.

HANKINSON: Is it your view that the appropriate test for making this determination is the 5<sup>th</sup> circuit's test in *Trotter*, and I believe they were following a 1<sup>st</sup> circuit case *Waldon(?)*, it's your view that that's the rule that has been generally applied by the cases and should be applied in this case?

WATLER: Yes, it is. Because Mr. McLemore was a public figure, he falls among the categories of liable plaintiffs who are required to prove the existence of actual malice in order to prevail in his libel action. This court held in the *Castle v. Brand* and *Carr v. Brasher* cases from 1989 that a libel defendant is entitled to summary judgment if he can negate the existence of actual malice. Here this record shows that there was no actual malice associated with this broadcast. And of course actual malice is a term of art in libel cases, and it speaks to the reporter of the broadcaster's state of mind at the time of the alleged defamatory report. And it asked whether or not the reporter had a state of mind where he or she was free of doubts as to the truth of the broadcast. Here the only

evidence in this record is absolutely undisputed, is testimony by Valerie Williams, the WFAA reporter, that she believed the truth of the report. She believed this report that she presented related to John McLemore.

SPECTOR: Can a television station escape liability by repeating a story that is on CNN reports today? What need they do beyond that?

WATLER: There are two ways. I understand what you're saying. Is it enough to insulate you from liability to simply say someone else has said this, someone else has reported it? Typically that will arise in two ways, and both of which are dealt with in this case. One, is whether the subject of that report is a public figure and the person making the report makes the report without doubts as to truth of it, which occurred here. The other way is classically and in the common law a privilege. And the common law, apart from the First Amendment protections, the common law long ago protected speech that was reporting official proceedings, official allegations that were under investigation. So here what Cathy Fair was saying on Nightline is not so much that the statement was made on Nightline, but that she was accurately reporting an official investigation that was then underway by both federal and state law enforcement officials, and Texas has long recognized that privilege both under common law and by statute, and we believe it's constitutionally based. So if you accurately report that the police are investigating these allegations, then the reporter is not put to the proof of the underlying allegations.

SPECTOR: If they only report what another station has reported?

WATLER: What the other station reported does not...if the report is not associated with a fair report privilege. In other words, if it's a report of an official investigation, if it doesn't concern a public figure or a public official, there may well be liability for repeating what the other broadcaster has said if it is not true. It in and of itself does not insulate a broadcaster from liability. There has to be other circumstances attached to what the first broadcaster said that would insulate the second broadcaster from liability.

GONZALEZ: With regards to when Mr. McLemore's name first surfaced as perhaps the person who tipped the Branch Davidian his name was not mentioned on the Nightline report?

WATLER: That's correct.

GONZALEZ: WFAA mentioned his name?

WATLER: WFAA mentioned his name and included video of him reporting live from the scene in the context that he was one of several reporters at the scene at the time.

GONZALEZ: They did not say he was the one that tipped off the Branch Davidians?

WATLER: Absolutely not. And that is of course, the characterization that the plaintiff, the respondent, gives to the broadcast. And it's our position that the broadcast is not reasonably capable of that particular defamatory meaning. He says, "we fingered him as the tipster." And I think any fair reading or fair viewing of the broadcast shows that he correctly was mentioned to be among a group of persons who were actually under investigation at that time for being the tipster. And that's the essence of the report.

GONZALEZ: For summary judgment purposes, we have to take their statements as true and correct?

WATLER: No, not as to defamatory meaning because that is a question of law. Whether the broadcast is susceptible to the characterization, the interpretation, the meaning that the plaintiff gives it, is a pure question of law that this court has said in *Musser v. Smith*, is a threshold question. And it doesn't depend on the summary judgment evidence. It's a question of law: Is this broadcast capable of being interpreted to say that John McLemore without doubt has been found to be the tipster, which is his theory of the case? And our position is simply it's not capable of that defamatory meaning, which is yet a third category from which WFAA was entitled to summary judgment.

ABBOTT: You seem to be saying that the only evidence concerning malice was the affidavit of Valerie Williams. You're saying that she subjectively believed the truth?

WATLER: That's correct.

ABBOTT: If mere subjective belief by the person accused by the defamation \_\_\_\_\_ sufficient to overcome malice, would that not for all practical purposes eliminate malice?

WATLER: It does not because it cannot be just a bare bone belief: I believe the trust of what I've reported. It's not explicit but I think a careful reading of the *Castle v. Brand* case shows that there has to be support for that belief. There has to be some basis for making that belief, and Valerie Williams sat that basis of her belief out. She was relying on the credibility of Cathy Fair of the Houston Chronicle, ABC News, statements made by the ATF. So she had a basis for her belief that what she was reporting was correct.

ABBOTT: The arguments, at least as I've perceived them by the respondents in their brief, seem to cast a picture of wilful disregard on the part of WFAA, and would you agree that wilful disregard of the truth would be sufficient to establish malice?

WATLER: The term is "reckless disregard" that the US SC and this court has recognized, and yes, that is sufficient. However, the legal standard, and this again is a term of art that is often misunderstood, a reckless disregard for the truth in a medial libel action means publishing something

while entertaining serious doubts as to whether it was true. It's a subjective standard. It's not an objective standard. It's not whether the light was red, but you ran the light. It's what were you thinking at the time? Did you publish something saying, "well I'm not really sure if this is true or not, but we're going to go ahead and publish it." That is the reckless disregard that would be sufficient to defeat a motion for summary judgment.

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RESPONDENT

WHITE: The question for decision today is not whether it is permissible to attack a television anchorman, but what degree of truth must be used in the attack? Answers to that question begin with the proposition that the individual's right to protection of his own good name reflects no more than our basic concept of essential dignity and worth of every human being. And that concept is at the root of any decent system of ordered liberty.

It is the privilege of the various states to fashion the protection for individual reputation. The Constitution only requires that we support a wide-open and robust debate of two types of people whose reputations must give way, that is public officials who are elected and required to join in the debate, and public figures who are either so famous that they can't avoid the debate, or they voluntarily join in the debate on a public issue.

GONZALEZ: Let's take your client for example. Your client was on TV for 5 years, 5 nights a week, he was one of the first reporters at the incidence that gave rise to this lawsuit, he was on live, he was on CNN, worldwide, he gave news conferences, many news conferences about this issue. Under what definition is he not a limited public figure?

WHITE: Those things, notoriety, gaining notoriety are only a part of the equation. The SC has looked at several people who they have said have obtained the type of notoriety that opens their reputation for debate for all purposes. It named Wally Butts, who was a Bear Bryant in his day. But Mrs. Firestone, who the court said was so well known that she had to have a press clipping service to keep track of the times the media had mentioned her, is not a public figure even though she is well known. Notoriety does not make the equation. What is important in determining whether a person is a public figure and has given up the right to his own good name is whether he has joined the debate. That means has that person actually tried to influence the public's opinion on a controversy?

HANKINSON: Given the facts that Judge Gonzalez just gave you what's missing from those facts that keep Mr. McLemore from becoming a public figure?

WHITE: He is not the type of person that has persuasive power and influence. What McLemore was on TV about was that he was on the scene and there were some men who were being

killed and he went up to try and help them. And if a person makes a decision at that point to give up his own good name when he aids those that are in need of help, I think that's a bad decision to say at that point your reputation has been given up.

ABBOTT: So you're saying we should not apply the standard set forth in *Trotter*?

WHITE: *Trotter* mentions some of the right things. I've got four things that I think make up the equation about what a person is if he's a public figure.

BAKER: Did you agree with *Trotter* as the test?

WHITE: I don't agree that *Trotter* is the test. I think *Trotter*, as a case, was properly decided. The test is not the end all.

ABBOTT: And why are we not bound by *Trotter*?

WHITE: *Trotter* is a 5<sup>th</sup> circuit case. It came from the DC circuit, and the 5<sup>th</sup> circuit adopted it, but they really didn't give much discussion other than to say here's the one, two, three in *Trotter*. Then they went through and described what Mr. Trotter had done, what kind of person he was, and why he had involved himself in the resolution of this public issue, and therefore, was fair game in his reputation. If you recall, *Trotter* was a labor violence case down in Central America. And the first question that arose is why are we having all of this violence down here and where is it happening that it centered on Trotter's plan. It turned out that Trotter was the president and responsible for day-to-day operations at that plant, somebody should be able to ask him why are you having these problems. And when he answered, he answered 1) you know we ought to go sue those guys for defamation; and 2) he was asked to speak out on a shareholder resolution to all the shareholders of Coca Cola Corporation. And to say that that man was not in the middle of the controversy by his own volition speaking on an issue of public concern would be a wrong decision.

HANKINSON: *Trotter* was decided in 1987, and it followed an earlier case that had been decided, and since then would you agree that most courts who have looked at the issue have applied that test or some variation of it?

WHITE: I will say that some variation is correct. I will also say that courts have said when they are trying to decide who's a public figure it's like nailing a jellyfish to a wall.

HANKINSON: So has that generally been the test that has been used by state courts and federal courts since at least the mid 1980s when this question has been presented?

WHITE: It has been cited often.

HANKINSON: What other tests have been used by state or federal courts who have looked at this issue since the mid 1980s?

WHITE: There has not been another 1, 2, 3 test that I can present to you.

BAKER: Are you asking us to devise another test to apply in this particular case?

WHITE: I don't think there is any need to devise a test. I think that the public figure question is one that is decided on a case-by-case basis.

BAKER: I noticed your argument today and your brief always used the phrase "public figure." You seem to be skirting the issue of a limited public figure, which is not the same, is that right?

WHITE: That's correct, and I haven't gotten there yet.

BAKER: Their position is that without a doubt in their mind, Mr. McLemore is a limited purpose public figure and I'd like to hear from you on why he's not in this particular incident. Would you agree that there can just be one incident? You don't need to look at his prior history as a TV anchor person for the Waco station? This one incident can make him a limited public figure?

WHITE: Absolutely.

BAKER: Then why is he not in this case?

WHITE: Because there was no controversy on which he was speaking out.

BAKER: First, isn't it true that Ms. Fair said on Nightline that the ATF thinks somebody from the media leaked the raid?

WHITE: She said that.

BAKER: Didn't he also say in his affidavit that as soon as the broadcast was over, the station was flooded with calls outraged about that, and that Mr. McLemore's name was used by these callers after Cathy Fair's report?

WHITE: Yes, that's in the record.

BAKER: And she never used his name in her broadcast?

WHITE: That's correct.

BAKER: And he also had a world-wide press conference after the events right there on the premises?

WHITE: Okay, but that's different than the Nightline newscast.

BAKER: So in other words before anybody ever used his name people in Waco already were using his name as the alleged perpetrator whether it was true or not?

WHITE: I want to tell you that the facts are a little bit out of order the way that you put them to me. That may be your intent in doing so.

BAKER: No, not necessarily.

WHITE: The so-called press conference was: McLemore goes out and he carries the ATF guys out on his car. Later in the day people come up to him with a microphone and asked what happened? He did not according to the summary judgment evidence call people together and say let me tell you my story. He was the guy that had the injured ATF people in his truck, and people asked what happened to him? Then the Nightline newscast took place. So putting the press conference after Nightline would be a wrong order.

BAKER: I didn't mean to do that.

WHITE: In any event, the fact that somebody called in later and named him doesn't really excuse WFAA from naming him, and we say that they did.

BAKER: I want you to focus on why you believe Mr. McLemore is not a limited purpose public figure based on the facts of this case, which is a question of law?

WHITE: McLemore is not when he goes and takes his job assignment to report on an event and he reports on the facts of the event, and does not in anyway say the government did a wrong thing, the government did a right thing, the Davidians are right, the Davidians are wrong, he does not get into the debate on who is right or wrong here. He just says what happened. He has not injected himself into the debate on public controversy. He has not opened his reputation for all to investigate merely by saying what happened. That's just exactly what was going on with Elmer Gertz. The man was doing his job as a lawyer and although it was bound to get some public attention, the court said, "that doesn't mean that just because you get public attention, you have opened your reputation." The same can be said for Mrs. Firestone. The same can be said for \_\_\_\_\_ Walston(?) who intentionally ignored a grand jury summons and knew at that point that he would garner some public attention. It would not be favorable. But that did not open everything in his life to public examination absent reasonable investigation.

HECHT: In your view, if Ted Koppel had been in McLemore's shoes, the same result?

WHITE: Ted Koppel does not report merely the news.

HECHT: But if he had in this particular case. They go out every once and awhile.

WHITE: The jellyfish is really bad on who's famous enough and who's not famous enough. I believe, and I am arguing to you that John McLemore is not as famous as Mrs. Firestone was.

PHILLIPS: What's the relevant geographical area?

WHITE: I think that it has to be the same area in which the publication was made.

PHILLIPS: So if it's worldwide somebody that has 20 friends in each city in the world is going to be ahead of someone that's universally known in one town in Texas?

WHITE: I guess what I am responding to is the arguments that have been made by some of the amici in this case that there is such a thing as a local all purpose public figure. And that may be true if the publication about that figure is limited to his locality.

OWEN: If Ms. Firestone had been defamed in the Palm Beach newspapers would she had been a limited purpose local figure?

WHITE: In the Greensheet in Palm Beach if it had said something about her, I think she would have had less of an argument that she was not a public figure. But the purpose of that public figure status is, that that person has opened themselves up to the area where they have it if it's local, that they have pervasive influence there. You can't take a person in Palm Beach society and say they have pervasive influence there and then publish it in Time magazine and expect that person to have an ability to reply. And that's one of the key things you have to consider when you say a person is a public figure, do they have an ability to reply?

BAKER: Well certainly whether he did or not, since he's a TV anchor person, he has the opportunity to reply.

WHITE: I will tell you flat out no, he doesn't. The summary judgment evidence in this case if you will read Mr. McLemore's deposition testimony, pages 133 and 248 says, "I was told by my boss not to give another interview after that comment was made. I did not give an interview because I was afraid I would be fired." A television anchorman who gets up there and is supposed to report the news does not have the chance at that point to say, "Breaking away from today's news, let me respond to the personal allegations that have been made against me." So that's why I said flat

out, no, he doesn't have the ability to reply to this.

BAKER:                   The petitioner says he appeared on talk shows and other things over the next 3-4 years?

WHITE:                   After he was fired by his station. So did people continue to ask him about it? Yes they did. But it's not the kind of inherent ability that the courts have said is expected of a public figure. That being that person has the power to compel others to listen to his side of the story. And McLemore doesn't have it. And that's one of the key things. It's mentioned in *Trotter* as a matter of fact that we look at whether this person has the ability to reply or not. But see they didn't put it in that 3-part test. But ability to reply is certainly highly relevant to a person's status as a public figure.

HANKINSON:            Mr. Walter has said and his brief indicates that the weight of authority is that news media personalities are either general purpose public figures or limited purpose public figures. Do you agree that the weight of authority, you've looked at this question in various fact situations has gone that direct?

WHITE:                   Yes.

HANKINSON:            Do you know of any other case besides this decision by the Waco CA that has gone the other way?

WHITE:                   No. I can tell you why that's right though. And that is because in those cases you're looking at a journalist who is a commentator. Take their leading case *Dracos*. What did they say about Mr. Dracos? Mr. Dracos' newscasts were highly accusatory. He put his interviewees on the rack and did not hesitate to lay on the verbal whip (is from the CA's opinion in that case). These people that are cited as being public figures because they are news people are people who lay on the verbal whip. What's good for the goose is good for the gander is what the court is saying when it consistently holds that these people are public figures. They say, you have opened the debate on that, you are subject to the rule in *New York Times v. Sullivan*. But we don't have a case like McLemore where the defamed person is a person who did nothing but report dry facts. They are all people.

HANKINSON:            Are you saying then that all of the cases that have been decided by these 21 other jurisdictions all involve personalities like Mr. Draco who were hot buttons in terms of the kind of broadcasting they did?

WHITE:                   In varying degrees. I will not tell you that all 21 of them are people who have laid on the verbal whip. The majority of the cases that I have read are people who have expressed an opinion on a public question. They have said, "you know what we ought to do or this is what I don't like about this that's happening." They've opened themselves to the debate. They have

voluntarily assumed the risk that somebody's going to disagree with them and criticize them for taking that stand.

ABBOTT: What was the geographic region of the publication?

WHITE: It went out from Dallas.

ABBOTT: But was it just for the local TV shows in Dallas? Was it published nationwide, or was it even published in Waco?

WHITE: I'm going to have to go outside the record to tell you anything about Channel 8, WFAA. It's north east Texas. We get it down in Waco.

ABBOTT: The bottom line is, there is nothing in the record establishing the geography of the publication?

WHITE: There is nothing in the record that establishes the geography of the publication. I tell you that from my memory of it. I didn't look to see specifically how to answer that question.

What we are looking at here in truth is a knowledge that what was said about McLemore was not true. He was not the tipster. He was not hiding in the trees. Nobody believed McLemore had tipped them, and nobody had information.

GONZALEZ: Without even mentioning his name in the Nightline program his station was flooded with calls accusing McLemore of being the person who did the deed.

WHITE: And I may have overstated what I meant to get across to the court. And that is, that there was not anybody from the government, a Texas Ranger, an FBI person that was saying, "We think that it was a local media person. We think it was John McLemore." When the questions were asked by WFAA at the news conferences: What do you know about the media tip? The answer they consistently got was, "We don't know anything." And to continue to report and to put a picture of McLemore by the voice over that says, "It's been reported that the local media has done this," is not responsible reporting. It is not reasonable investigation.

There is an addition by WFAA to the Chronicle reporting that is the identification of McLemore and implication that he is involved. I want to take a chance here to cite part of *Firestone* that I did not cite in my brief and that is, even if you looked at the Nightline report and said, "well that is a reasonable interpretation of what was going on at the time," *Firestone* says, that even if there are varying interpretations of the events, the media is not entitled to take the one that is most damaging to the individual and put that out. In that instance, they have to prove not only



WHITE:                   Until WFAA published their statement, yes, I think it did.

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REBUTTAL

WATLER:                Mr. White said that Mr. McLemore is just like Elmer Gertz, the plaintiff in the landmark SC case. In that case, it is notable that Elmer Gertz as the SC held or noted never held a press conference, never spoke to the press, never made any comments to the news media about the case that he was handling.

OWEN:                  What was the substance of those press conferences? Was it limited to just the bare facts of the \_\_\_\_\_?

WATLER:                The press conference that Mr. McLemore had was when he left the scene of the raid, the immediate aftermath of the raid and there were basically the what happened questions. What happened? Who shot first? How many agents were wounded? What did you see happen? That was his press conference.

OWEN:                  How did that draw him into the public debate about whether someone had been tipped off or why or what went wrong with that raid?

WATLER:                First off, at the time that Mr. McLemore was having his press conference right after the raid, the ATF agents who were carrying their dead and wounded off the compound were openly saying that, "We believe that this raid went wrong because of the actions of the local news media, including John McLemore, whose presence at the compound uninvited at the time that the raid commenced alerted the cult and allowed them to lay an ambush." They were saying that then, they said it later when Cathy Fair among other reporters were speaking to ATF members, then Cathy Fair went on Nightline and reported it publically 48 hours later. And before Ms. Fair appeared on Nightline, the very first print news stories about the Davidian raids raised the issue of what was the role? What was the responsibility of the local news media and what went wrong out there?

OWEN:                  You keep emphasizing he called press conferences or he participated in. What is it about those press conferences that drew him into the debate on what went wrong in Waco?

WATLER:                As they have been characterizing it in this case, he portrayed himself as a hero: "I was out there and I did what I could to help save these agents." The controversy was whether or not he was in fact not a hero, but the perpetrator of what went wrong out there, and that's how he got drawn into this controversy. He was more than willing for the world to think of him as a hero, and in fact received commendation from the ATF. But the flip side of the coin is, well maybe you're not a hero, maybe you bear some responsibilities, some fault. And that was an issue that emerged as the controversy before WFAA ever reported on it. WFAA didn't create this controversy. They reported

on the controversy and they reported on it accurately.

SPECTOR: Do you have the same view of the opposing counsel that if he was a TV anchor, he was not an all purpose public figure unless he was a commentator in someway?

WATLER: Well if that's the test, and I don't believe it is, he certainly fulfills that. There are numerous affidavits that Mr. McLemore himself submitted of people calling in saying that they thought of John McLemore as an opinion maker. Now a straight news reporter is not someone who makes opinion. And this is his evidence, not our evidence. But these viewers calling after the Nightline show referred to him as an opinion maker. And we have the recent example here in Texas of the *Draco* decision from the San Antonio CA.

OWEN: But was he an opinion maker in Dallas?

WATLER: I do not know of any commentary he had given on any broadcast in Dallas. His live reporting from the scene of the raid was carried on WFAA.

OWEN: If that's all that there had been, just that alone, does that make hm a public figure simply because his newscast is picked up by the national feeds?

WATLER: This newscast when he goes and asserts himself into the raid, when he thrusts himself into this vortex of the controversy, and there was already a prior controversy over the Davidian, and actions or lack of action on the part of law enforcement vis-a-vis the Davidian, there had been a series of newspaper articles that had just started to be published by the Waco newspaper the day before, so McLemore takes the controversy as he finds it. I mean he was there not just because the ATF was there, but because there was already a controversy in the news media about the Davidians, and he inserts himself quite physically into that particular controversy.

HECHT: So the ATF agents were public figures too?

WATLER: Well they are public officials.

HECHT: Just a guy who is out there carrying the weapon is a public figure?

WATLER: He's a public official. Particularly law enforcement officials who have in some circumstances the authority to use deadly force. Classically they are held to be public officials, separate category public officials in libel actions. If one of the ATF agents had brought a libel action more than likely the correct decision would be that that person was a public official for purposes of *Times v. Sullivan* analysis.