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Scheme to Defame Political Candidate Coupled with Unreasonable Headlines Is Evidence of Actual Malice.

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record against his testimony. Texas courts must now accept the fact that the right to cross-examine adverse witnesses in the truth seeking process outweighs the limited interests of the State in protecting its witnesses who have charges pending against them.

The Texas Court of Criminal Appeals has established some objective standards for the courts to use in the exercise of their discretion on limitation of cross-examination for bias impeachment. *Evans* represents the proposition that indictments, complaints, or informations will no longer be automatically excluded from evidence for impeachment of witnesses not a party to the prosecution. The *Evans* decision, when coupled with the right under article 38.29 to impeach an accomplice witness for bias with pending charges,[55] will furnish Texas with a "complete" approach to bias impeachment. In the future, when there is a principal witness furnishing vital and relevant testimony against the accused, any pending charges against that witness may be introduced to show any taint of bias or motive on the part of the witness to falsify his testimony.

Jess C. Rickman

LIBEL—Constitutional Privilege—Scheme to Defame Political Candidate Coupled With Unreasonable Headlines Is Evidence of Actual Malice

Sprouse v. Clay Communication, Inc.,
211 S.E.2d 674 (W. Va. 1975).

Two weeks before the West Virginia gubernatorial election of 1968, the Charleston Daily Mail, owned by defendant Clay Communication, Inc., published a series of articles concerning certain real estate transactions of James M. Sprouse, the Democratic Party candidate. His opponent's campaign staff had released the information and had participated in an investigation with the newspaper. The oversized headlines referred to the real estate transactions as a "land grab," "bonanza," and "cleanup," implying a clandestine character through the use of "dummy firm" and "disclosed." The text of the articles, however, did not support these representations. In a suit for libel, Sprouse alleged that the articles were defamatory and was awarded $250,000 actual and $500,000 punitive damages by the jury. Held—

55. TEX. CODE CRIM. PROC. ANN. art. 38.29 (1966).

Affirmed.[1] Once a scheme to defame a political candidate for office is established, an unreasonable deviation between the headlines and the text of the publication is in and of itself evidence of actual malice, which can support a jury verdict for libel.

Social conflict between the individual interests of reputation and freedom of the press began centuries ago. The invention of the printing press produced political libel.[2] Libel and the media were governed by the common law standard of "fair comment."[3] Opinion and comment were protected, but proof of malice, in the sense of personal spite or ill will, defeated this qualified privilege.[4] These conflicting interests have always existed in this country, yet there has also been a strong national commitment to the fundamental freedom of press.[5] Originally, the first amendment freedoms restrained only actions of the Federal Government, but in 1925 they became applicable to the States through incorporation by the fourteenth amendment.[6] In 1964 *New York Times Co. v. Sullivan*[7] made the constitutional privilege of free press a reality by limiting the power of the states to determine whether a public official has been libelled.[8] In *New York Times,* the Supreme Court held that the law precludes recovery by public officials unless they prove that the statement was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[9] The fundamental constitutional principle underlying the "actual malice" rule is free political expression,[10] which includes severe criticism of public officials[11] and the protection of erroneous statements.[12] Apprehensive of any law which might discourage criticism of the government,[13] the Supreme Court created this strict standard requiring "convincing clarity"[14] to safeguard the

1. The Supreme Court of Appeals of West Virginia affirmed the judgment of the Circuit Court of Fayette County as to the actual damages but reversed and remanded with instructions to strike the jury award of punitive damages. Sprouse v. Clay Communication, Inc., 211 S.E.2d 674, 698 (W. Va. 1975).

2. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 738 (4th ed. 1971); Veeder, *The History and Theory of the Law of Defamation,* 3 COLUM. L. REV. 546, 561 (1903).

3. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 118, at 819 (4th ed. 1971).

4. *See generally* 53 C.J.S. *Libel and Slander* §§ 100, 132, 134 (1948).

5. New York Times Co. v. Sullivan, 376 U.S. 254, 271-76 (1964).

6. Gitlow v. New York, 268 U.S. 652, 670-71 (1925).

7. 376 U.S. 254 (1964).

8. *Id. New York Times* arose from the minority view in the state courts that criticism and comment should extend to any false statements of fact if honestly believed to be true. Three-fourths of the states held that the qualified privilege of "fair comment" was limited to opinion and comment only. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 118, at 819-20 (4th ed. 1971).

9. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

10. *Id.* at 269-71.

11. *Id.* at 270.

12. *Id.* at 271.

13. *Id.* at 276-79.

14. *Id.* at 285-86; *see* Comment, *Vindication of the Reputation of a Public Official,* 80 HARV. L. REV. 1730, 1733-34 (1967).

freedoms of speech and press.[15] The "actual malice" standard has been expanded to include political candidates[16] and public figures.[17]

Later Supreme Court decisions have defined "actual malice" as that which requires a "high degree of awareness of probable falsity,"[18] or "serious doubts as to the truth."[19] The rule, however, does not pertain to unreasonability, negligence or even gross negligence.[20] "Actual malice" focuses on the truth or falsity of the published material, entirely different from the common law standard of "malice" which concerned a defendant's attitude.[21] It is well established that intent to injure, hostility or ill motive, all of which evidence "malice," are constitutionally insufficient to show "actual malice."[22] The Minnesota Supreme Court has held that allowing the jury to consider personal ill will as relevant is incorrect notwithstanding proper instructions on actual malice.[23] There is, accordingly, a significant distinction between intent to injure and intent to injure through falsehood.[24] Evidence of a hostile or adverse attitude evinces intent to injure, as opposed to evidence of knowledge of a falsehood or reckless disregard of the truth which indicates intent to

15. New York Times Co. v. Sullivan, 376 U.S. 254, 264 (1964).

16. Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971). The Supreme Court stated that it was illogical that publications regarding candidates for public office be accorded any less protection than those concerning occupants. *Id.* at 271.

17. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

18. Garrison v. Louisiana, 379 U.S. 64, 74 (1964); *accord,* St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

19. St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Actual malice may be shown by proof that the story was fabricated by the publisher, that the source of information was unreliable or the information inherently improbable, which the publisher knew or recklessly disregarded, or that the publisher recklessly disregarded the availability of information to disprove the falsity. *Id.* at 731-33.

20. New York Times Co. v. Sullivan, 376 U.S. 254, 287-88 (1964); *accord,* Garrison v. Louisiana, 379 U.S. 64, 79 (1964). In an opinion by Mr. Justice Brennan which expressed the views of six Justices, three concurring, it was stated that: "The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." *Id.* at 79.

21. Cantrell v. Forest City Publishing, — U.S. —, —, 95 S. Ct. 465, 470, 42 L. Ed. 2d 419, 426-27 (1974).

22. In Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967) the Court reversed a West Virginia decision where the instructions stated that the plaintiff could recover if it were found that the defendant published editorials with ill motives and intent to injure. *Accord,* Garrison v. Louisiana, 379 U.S. 64, 78 (1964), where the Court found that any definition of actual malice which included "ill will, evil motive, intention to injure . . . is constitutionally insufficient in discussion of political affairs." In Rosenblatt v. Baer, 383 U.S. 75, 84 (1966), it was held improper to base recovery on mere intent to injure.

23. Rose v. Koch, 154 N.W.2d 409, 421-22 (Minn. 1967). In Washington Post Co. v. Keogh, 365 F.2d 965, 967 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967), the court stated that juries are not allowed to infer malice from the face of a publication or a defendant's hostility.

24. In Henry v. Collins, 380 U.S. 356, 357 (1965) the distinction was made where the Court held that the instructions were improper because they could have been under-

injure through falsehood. Intent to injure shows malice, whereas intent to injure through falsehood proves actual malice.[25]

In *Sprouse v. Clay Communication, Inc.*,[26] the West Virginia Supreme Court of Appeals held that once a scheme to injure has been established, an unreasonable deviation between the headlines and the text of a newspaper is evidence of actual malice. It is a case of first impression; an attempt to create a basis for proving actual malice.[27] Though the court admitted that, by itself, an unreasonable deviation would be insufficient to support "actual malice," it allows a jury to infer "actual malice" from the face of the publication, once a conspiracy to defame through publication has been shown.[28] The rule is structured on the proposition that the defendant newspaper, the Daily Mail, was no longer acting in the capacity of a fact-finding, impartial reporter of news, but rather as a participant in a conspiracy to defame.[29] The newspaper's source of information was the plaintiff's political opponent, whose campaign staff aided the newspaper's investigation of the real estate transactions and assisted in disseminating the article to other newspapers. This was evidence of the newspaper's departure from its role as an independent news-gatherer, and of its intent to injure by exposing the political candidate Sprouse.

The American system is one of adversity and participation.[30] The court's premise that *New York Times* and its progeny regard newspapers as

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stood to allow recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood. *Accord,* Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 9-11 (1970).

25. Henry v. Collins, 380 U.S. 356, 357 (1965); *accord,* Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 9-11 (1970).

26. 211 S.E.2d 674 (W. Va. 1975). It will be assumed for the purposes of this analysis that the evidence supports the findings of the court—that the Daily Mail had abandoned its role as an impartial reporter of facts, that there was a scheme to injure and that the deviation between the headlines and the supporting article was unreasonable.

27. Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), expresses the difficulty in proving actual malice:

> The obvious purpose of these cases is to create a rule of law more restrictive for public official plaintiffs than the pre-*Times* practice of allowing juries to infer malice from the face of defamatory publications. (Citation omitted.) Malice, under the pre-*Times* practice, was equated with hostility, vindictiveness or negligent disregard of reputation. Under the *Times* test, false statements made with these motives alone are not actionable; maliciousness may be shown only through knowledge of falsity or reckless disregard of truth or falsity.

Id. at 967; *see* Comment, *Defamation of the Public Official,* 61 NW. U. L. REV. 614, 634 (1966).

28. Sprouse v. Clay Communication, Inc., 211 S.E.2d 674, 682-83 (W. Va. 1975).

29. *Id.* at 682-83.

30. Judge Learned Hand stated:

> The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

"independent, news-gathering agencies" is unsound.[31] The idea of an involved, biased and opinionated press permeates the whole of *New York Times*.[32] It adheres to the proposition that " '[p]ublic men, are, as it were, public property,' and 'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.' "[33] The law of *New York Times* lives in the atmosphere of an "uninhibited, robust, and wide-open" press,[34] not "confine[d] . . . to reporting the facts . . . in temperate terms . . ." as *Sprouse* intimates.[35] These acts of partisanship and adversity by a newspaper reveal an intent to injure; irrelevant in the determination of "actual malice." Politically valuable knowledge, essential to the democratic system, cannot be ignored simply because the opposition proffered the information and aided the investigation.[36]

The court in *Sprouse* treats the departure from objective reporting as tantamount to a conspiracy to defame.[37] Acts of partisanship indicate intent to injure whereas evidence of a scheme or conspiracy to defame evinces intent to injure through falsehood, pertinent in the determination of knowledge of the falsity or reckless and willful disregard of the truth.[38] This integration of partisan reporting and conspiracy to defame exists primarily because the sufficiency of the scheme is wholly dependent upon the evidence of the departure from independent, neutral reporting.[39] The scheme to defame de-

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New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), *quoting* United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). The Court further stated:

> [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

31. Sprouse v. Clay Communication, Inc., 211 S.E.2d 674, 687 (W. Va. 1975).

32. New York Times Co. v. Sullivan, 376 U.S. 254, 269-76 (1964).

33. *Id.* at 268, *quoting* Beauharnais v. Illinois, 343 U.S. 250, 263-64 n.18 (1952).

34. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

35. Sprouse v. Clay Communication, Inc., 211 S.E.2d 674, 689 (W. Va. 1975).

36. New York Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir. 1966). In circumstances similar to *New York Times Co. v. Sullivan*, a staff reporter was assigned to cover the racial violence in Alabama in 1960; the resulting article referred to the local police commissioner. The source of the libelous statements were negro ministers and biased participants in the racial conflict, and the court ruled that these biased sources certainly did not constitute reckless and willful disregard for the truth. The court stated:

> While verification of the facts remains an important reporting standard, a reporter, without a high degree of awareness of their probable falsity may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official.

Id. at 576; *accord,* Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1028 (5th Cir. 1975).

37. Sprouse v. Clay Communication, Inc., 211 S.E.2d 674, 680-81, 691-92 (W. Va. 1975).

38. Henry v. Collins, 380 U.S. 356, 357 (1965); *accord,* Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 9-11 (1970).

39. This departure from independent neutral reporting is apparent,

> [F]rom the evidence that not only did the Mail work closely with the Moore campaign staff to discover the details of the land transaction, but also that it fully cooperated in disseminating the articles to other newspapers for publication through-

pends entirely upon the evidence that the Daily Mail acquired the information from a political opponent whose campaign staff assisted the investigation and dissemination of the news release. But material information derived from the political opponent does not necessarily amount to conspiracy. Even if this evidence were construed as supporting a scheme to defame, the rule would nevertheless fail constitutionally because it is couched in language admonishing adverse involvement by the press.[40] Failure to distinguish between "malice" and "actual malice," and their respective evidentiary character of intent to injure and intent to injure through falsehood has been the precise problem in several Supreme Court cases. In those cases "actual malice" was not found because it was impossible to determine whether the jury inferred "actual malice" from intent to injure rather than knowledge or reckless and willful disregard.[41] *Sprouse* fails to recognize the distinction between evidence evincing intent to injure and evidence of intent to inflict harm through falsehood, just as it fails to distinguish partisan reporting from a scheme to defame.

To support the relevancy of departure from objective reporting in the determination of actual malice, *Sprouse* relies heavily on *Curtis Publishing Co. v. Butts*.[42] In that case a public figure was libelled by a national magazine which had adopted a new policy of scandalous "muckraking" to increase circulation. The magazine employed very poor investigatory techniques and knew of their source's questionable integrity. The fact situation in *Curtis* is an excellent illustration of the guidelines later announced in *St. Amant v. Thompson*,[43] that "actual malice" may be shown by evidence that the publisher fabricated the story, recklessly disregarded the availability of information to disprove its falsity or knew that the source of information was unreliable. Obviously, *Curtis* presented circumstances which evinced intent to injure through falsehood, pertinent to the issue of "actual malice," but it is illogical to hypothesize that departure from independent news-reporting is evidence of actual malice. In *Curtis*, the departure from objective reporting was extensive—evidence of intent to inflict harm through falsehood. Whereas in

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out the State. Under those circumstances the difference between the fair implication of the headlines as opposed to the supporting factual recitation of the stories is evidence alone of malice, which absent evidence to the contrary, supports the jury verdict.

Sprouse v. Clay Communication, Inc., 211 S.E.2d 691-92 (W. Va. 1975).

40. *Id.* at 680-81, 691-92.

41. In Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) a member of the State House of Delegates was inferentially libelled by a newspaper in a neighboring town during real estate negotiations with the city council. The jury was instructed and found libel on the basis of general hostility toward the plaintiff combined with the falsehood. The Supreme Court stated that the judgment was constitutionally erroneous because it was impossible to determine "whether the jury imposed liability on a permissible or an impermissible ground." *Id.* at 11; *accord*, Henry v. Collins, 380 U.S. 356, 357 (1965); Garrison v. Louisiana, 379 U.S. 64, 78 (1964).

42. 388 U.S. 130 (1967).

43. 390 U.S. 727, 731-33 (1968).

Sprouse, there is merely zealous, partisan news-reporting—evidence of intent to injure.

Although the "actual malice" standard was extended to include public figures by the majority in *Curtis*,[44] the constitutional rationale applicable to political figures is different from the social interests apposite to public figures. The distinction is manifest in *Curtis* by the personal motive of publishing defamatory material about public figures for monetary gain compared to the motive of printing possible libel concerning political figures for political objectives. Personal objectives versus political ones; they are wholly different societal interests.[45] That constitutional rationale specifically applicable to the political environment, firmly supports the standard of "actual malice." Protection of seditious libel[46] cannot be mitigated by social policy apropos to private citizens who are the subject of public interest.[47]

The *Sprouse* rule that a scheme to injure, coupled with unreasonable, exaggerated headlines is relevant evidence of "actual malice,"[48] is defeatingly analogous to the combination of hostility and falsity denounced by the Supreme Court as imposing liability on an "impermissible ground."[49] In *Greenbelt Cooperative Publishing Ass'n v. Bresler*,[50] the lower court instructed the jury that the plaintiff could recover if it were found that the publications were made with malice or with a reckless disregard of whether they were true or false.[51] Notwithstanding instructions on "actual malice," the trial judge defined "malice" to include "spite, hostility or deliberate intention to harm."[52] The jury was allowed to find "malice" from the face of the publication. The verdict, structured on the combination of hostility and false-

44. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). See the separate opinions of Chief Justice Warren, Justice Black, and Justice Brennan.

45. It is of further interest to note that of the majority in *Curtis* which judged the magazine liable, the decisions of four Justices were based on the minority standard of highly unreasonable conduct, while the opinion of the Chief Justice was founded on the standard of actual malice. The standards applied will necessarily vary because the social justifications change according to whether the plaintiff is a mayor, a movie star or a laborer. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

46. New York Times Co. v. Sullivan, 376 U.S. 254, 273-76 (1964).

47. In Gertz v. Welch, — U.S. —, —, 94 S. Ct. 2997, 3004, 41 L. Ed. 2d 789, 801 (1974), the Court outlined the three basic approaches as espoused in the five separate opinions of Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971): (a) an extension of the *New York Times* standard to an expanding variety of situations, (b) to vary the level of constitutional privilege for defamatory falsehoods with the status of the person defamed, and (c) absolute immunity from liability for the press and broadcasting media. These diverse views reflect the rationale with which the Court is concerned when reviewing a libel suit. For example, newspapers should not be accorded the protection of *New York Times* against private individuals because private citizens are simply more vulnerable to injury having little or no access for rebuttal.

48. Sprouse v. Clay Communication, Inc., 211 S.E.2d 674, 680-81 (W. Va. 1975).

49. Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 11 (1970).

50. 398 U.S. 6 (1970).

51. *Id.* at 9.

52. *Id.* at 9.