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Supreme Court of Texas.
Bascom W. BENTLEY, III, Petitioner,
v.
Joe Ed BUNTON and Jackie Gates, Respondents.
No. 00-0139.

February 21, 2001.

Appearances:

Mike A. Hatchell, Hatchell P.C., Tyler, TX, for Petitioner.
Ronald D. Wren, Bedford, TX, for respondents.
Joe Ed Bunton for respondents.

Before:

Chief Justice, Thomas R. Phillips, Priscilla R. Owen, Nathan L. Hecht, Deborah Hankinson, James A. Baker, Xavier Rodriguez, Wallace B. Jefferson, and Craig Enoch.

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SPEAKER: O yes, O yes, O yes. The Honorable, the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas are admonished to draw near and give their attention for the Court is now sitting. God save the state of Texas and this Honorable Court.

JUDGE: Thank you. You may be seated.

JUDGE: Good morning and welcome to this oral submission docket of the Supreme Court of Texas. This is the first time in the history of the Supreme Court that we have sat in El Paso and the first time since 1891 that the Court is set outside of Austin or outside of one of the states law school, so it is a historic occasion for us.

This morning, there are three cases on our oral submission docket and in the order in which they will be presented, they are; first, Bascom W. Bentley III v. Joe Ed Bunton and others from Anderson County; then Long Distance International Incorporated and Star Marketing Service Incorporated v. Teleponos de Mexico S. A. de C. V. and others from Baylor County and E. I. Du Pont De Nemours and Company v. Pecan Valley Nut Company and others from Comanche County. In each matter, the Court has allotted 20 minutes for each side to present oral argument. The petitioner may reserve a portion of that time for rebuttal by advising the marshal of our Court. We will take a brief recess in between the presentation of this argument and we'll complete these arguments before noon.

The Court is now ready to hear argument from petitioner in Bentley

v. Bunton.

SPEAKER: May it please the Court, Mr. Mike Hatchell will present argument for petitioner. Petitioner has reserved seven minutes for rebuttal.

ORAL ARGUMENT OF MIKE HATCHELL ON BEHALF OF THE PETITIONER

MR. HATCHELL: May it please the Court. This is a defamation case brought by sitting District Judge Bascom W. Bentley [inaudible] local Texas radio -- television program for what the Court of Appeals called an 18-month campaign in which Judge Bentley was repeatedly called corrupt and a criminal, someone who ought to be in jail.

The affirmative judgment in this case in favor of Judge Bentley individually against Joe Ed Bunton and Colonel Gates, the two participants, was affirmed in part and reversed in part by the Court of Appeals. The Court of Appeal's reversal as to Colonel Jackie Gates one of the participants in the program as well as that court's affirmance of the trial court's denial of joining several liability as a result of a conspiracy resulting to two very interesting questions that I'll present to this Court this morning.

Question number one is, can a defamation defendant can be liable for publishing an agreement with another's defamation even if the act of provocation does not itself contain defamatory language. Issue number two is, does a defamation plaintiff have to obtain a finding of damages related explicitly to a conspiracy even though the jury finds that the members of that conspiracy who committed defamation and it awards damages against that --

JUDGE: [inaudible] two issues, do you believe that the Court Appeals applied the proper standard of review and had analyzed the case under the appropriate standard of review?

MR. HATCHELL: Yes, your Honor. The Court did apply the proper standards of review in every respect, the only question --

JUDGE: [inaudible] there will be appropriate standard of review [inaudible], but they did not analyze it under say, a preponderance of the evidence towards some other factors or things?

MR. HATCHELL: Your Honor, I -- I do not see that of -- in this particular case, the -- the defamatory statements themselves were undisputed. They're caught on a video tape, so you're dealing with undisputed facts in this case and I think, in the trial court and in this case determined that the defamatory statements were defamatory per se, so once you're beyond that, it seems to me then you're simply left with the question of publication and actual malice --

JUDGE: You're -- you're saying that unequivocally no doubt about it, but --

MR. HATCHELL: -- there's no question --

JUDGE: -- that was clear and convincing evidence --

MR. HATCHELL: Yes --

JUDGE: Let me ask you this, in as far as clear and convincing evidence, do we look only at the evidence which supports the verdict or do we look to evaluate all the evidence and weigh all the evidence to determine whether or not all the evidence can now be clear and convincing?

MR. HATCHELL: You must weigh all the evidence and that there's no question on that. And I think the Court of Appeals' decision in this

case is really remarkable for doing that it -- it devotes an enormous amount of verbiage in analyzing each one of all aspects in all sides of the grounds, which were proffered to contend that these statements were quote true.

JUDGE: Wasn't there evidence that Mr. Bunton generally believed that Mr. Bentley was corrupt or had [inaudible]. In other words, isn't this a situation where he thought, well, Mr. Bentley was a fine outstanding young man, but he reported [inaudible] anyway. He thought that Mr. Bentley was corrupt and his effort was to undertake an investigation and make allegations that perhaps, he was not corrupt, just as he thought was not corrupt, I mean, was corrupt but [inaudible]

MR. HATCHELL: Two answers to that question. The answer to your first observation, yes, Mr. Bentley -- pardon me, Mr. Bunton will tell you that he genuinely, well, he believed that. He's an interested party and that testimony can be factored out. I don't think that a clear and convincing standard requires the Court to factor in credibility choices for the jury. The second thing that I would say in response to that is, there were in discovery eight listed grounds for the defamation. Each one of those grounds was reviewed in the trial court in great detail and reviewed by the Court of Appeals in great length, and I think even one of the experts -- two of the experts who testified in this case would confirm that no rational person would entertain the belief that any of the grounds and the only grounds that justified the defamation would suggest to a reasonable person a legitimate honestly held [inaudible].

JUDGE: Mr. Hatchell, looking to the first issue that you mentioned which is part of your petition to the Court and that is the question of whether or not, a defendant in a case such as this can be liable for publishing a statement without actually uttering the words that are alleged to be defamatory, what are the limits of such liability if we were to recognize that as a basis for liability?

MR. HATCHELL: An interesting question, your Honor, and the first, well let me say that the Court I'm sure is familiar that in the Bell Sepino case you withheld that the overall impact of the publication in the defamatory even though the words they -- the statements are true and they are non-defamatory, but you raised an interesting question and I think in my own mind, I would say that in this case, and I'm sure the Court understands it, the trial judge submitted this case in an interesting way, and it was his -- his charge, he asked if Colonel Gates agreed with -- to Ed Bunton's defamatory statements, and if he published that agreement. I think what your Honor's concern is the proximity, and I do think that there must be some either temporal or physical proximity.

In this particular case, we don't have to worry about that because the publication is almost simultaneous with the utterance of Mr. Bunton. Well, I would say that should have a close temporal nexus or should have a close physical nexus. And let me see if I could give you what I think about physical nexus.

Let's assume that someone during campaign season, your Honor, places in my yard over which I have control, a very defamatory placard against Justice Hankinson accusing her of corruption and criminality. Maybe I'm not -- maybe I'm -- I'm sympathetic to them and because I'm in control of the neighbor to remove that and at least statement that say, that is also a defamation --

JUDGE: So, has control been an element of recognizing liability in this instance?

MR. HATCHELL: Well, I think at some instances it could be, in this

particular instance, I think that temporal nexus is [inaudible]--

JUDGE: Well, can I be withheld responsible if I happen to be in the room with someone else, if temporal proximity and physical proximity when they make a defamatory statement?

MR. HATCHELL: But no publication --

JUDGE: When I'm in a room full of people and I hear the defamatory statement, and I happen to be standing right next to the person.

MR. HATCHELL: Well, actually the restatement in some instances would probably support that. I do not know, and I do not think that Texas Law needs to go quite so far. Liable but silent, I think it was very slippery slope that we do not need to go down. In this particular case, what we have are positive -- we have words positive expression of affirmation. We also have a failure to purge a program of the contemporary -- of the defamatory statements --

JUDGE: Well, is it also critical that Colonel Gates present a position of being co-host on the show and making decisions about what would be broadcast or not, is that critical to the analysis as well --

MR. HATCHELL: It would be critical -- it would be critical, your Honor, in -- in two respect; number one, is affirmation using the word quote, yeah, or asking who is the most -- who is the most corrupt and basically intriguing. His status as the director of the show and someone who represents that he has the authority to clean it up, I think gives him the cache with the public to understand that he is giving a -- an authoritative affirmation.

JUDGE: Mr. Hatchell before your time is up, would you go to the second question that you said you were going to discuss with us and it has to do with the charge issue --

MR. HATCHELL: The charge issue is a very interesting question, your Honor, and our position on the matter, the -- the Court of Appeals has basically held that [inaudible] that in a case where you have two co-conspirators in a conspiracy to defame and -- and the Court of Appeals actually held that only one of them made defamatory remarks that you basically have to have three question. You have to have a defamation by a conspirator one, defamation by a conspirator two, and a question asking about the defamation of the co-conspirators. The difficulty I have with that is that conspiracy do not depend in conspirators advantage. If you look at this charge and you do not know the argument that Colonel Gates will present to you, that there were defamatory statements made before this conspiracy arose. There is nothing wrong with this charge.

But one of the problems I have is that the Court of Appeals to quote, seems to assume and almost choose what it thinks -- what it thinks the jury believed the conspirator started and what evidence it utilized in assessing damages that it to me invaded the province of the jury. I think in a situation like we have where they are claiming a temporal, factual defect in the charge that it was Colonel Gates' obligation and Mr. Bunton's obligation to request from the Court some limiting instructions or some grid by which it could apportion the damages --

JUDGE: Well, is it your position that there was error in the charge and then an objection to this has been waived or do you think that this charge is appropriate in the first instance that if we were to determine that it isn't that any error has been waived?

MR. HATCHELL: Your Honor, we made a tactical decision in the beginning of this case. We did not want a reversal and remand as a result of charged error. We believed that the charge, even though, it was not necessarily the one we've requested, we believed that the

charge was inappropriate. We have, however, as a result of the Court of Appeals' holding, now as this Court has severed, if the Court of Appeals is correct to sever and remand because it seems to me that the Court of Appeals has held that that there is almost a separate cause of action. If the Court knows from -- from its dealings with the harmless error cases, Torrington, and -- and others that we just normally don't reverse for defects in the charge and render [inaudible]. Nobody objected to this charge on that ground. So, that is our principal portion under *Allen v. National -- American National Life Insurance Company* and *Osterburg v. Pickett*, this charge becomes the law to this case. No one was complaining about this and in *Allen* indeed this Court held that -- that charge essentially was an assumption that the party wanted the case to be disposed of in this way. So, but, if the Court of Appeals is correct that there is [inaudible] and we believe that's severable and should be --

JUDGE: Mr. Hatchell, let me ask you again about the standard of review that -- that the CA should have applied. I believe that, we've agreed the clear and convincing standard is the one that has to be applied --

MR. HATCHELL: Now, question is this Court has held that in *Bell Sepino*

JUDGE: Of course --

MR. HATCHELL: -- and that is consistent with *United States* --

JUDGE: -- I don't think there is any dispute about that, but the Court of Appeals in reviewing the evidence spoke in terms scintilla of evidence and some evidence, how do you reconcile those two terms and did they conduct the proper review?

MR. HATCHELL: Your Honor, I think that there would be a -- in any appropriate analysis -- an -- an analysis of the record to determine that there was at least a scintilla of evidence to get you over with a no evidence threshold, but of course the Court must go beyond that. So, I don't think that the mere use of the phrase scintilla has failed to the Court of Appeals [inaudible] --

JUDGE: But do you -- do you think that would be an improper review, I mean, could you find a scintilla to support the clear and convincing would that work? How is --

MR. HATCHELL: Oh, that we have never --

JUDGE: -- how is that suppose to work?

MR. HATCHELL: -- I've never thought about that.

JUDGE: Well, the charge itself defines clear and convincing and are we to find that there's a scintilla to support that clear and convincing finding? Or how does that work? I don't think there's ever been an articulation of how we applied --

MR. HATCHELL: There -- there has not and I have -- I have not thought about the -- the scintilla rule as formulated in *Dusky v. Urban* is a rule of inference, and it is clearly the rule of inference is only Justice Garwood in his article prior to Justice Cambridge's article clearly discusses that in great detail. So, I do not think that in a review of the entire record, which would include direct facts as well as inferences that -- that you could say, that you could apply a scintilla or clear and convincing evidence --

JUDGE: So if --

MR. HATCHELL: [inaudible]

JUDGE: -- if in fact that's what the Court of Appeals did, you'd say that was an improper standard may have reached the same result with the proper standard, but you might agree that was an improper way [inaudible] --

MR. HATCHELL: And I'm -- I'm not willing to concede that the Court of Appeals applied an improper standard because I do think that in certain procedural posture, particularly where you have directive verdicts and that's what they held in this case, even though there was a directive verdict that should have been granted. I do think that you would -- you would very correctly apply a scintilla to see whether or not you had any evidence at all to which we apply clear and convincing evidence [inaudible] I know my times up that any questions here, I'm open to quick answer though.

JUDGE: The -- the objection to any evidence supporting a \$7 million award that -- it appears that if there's binding analysis, there was here then really is this entirely up to the jury to determine what the damage will be. Is there any sort of First Amendment implication to a -- an award of \$7 million in a defamation case, [inaudible].

MR. HATCHELL: Your Honor, I guess if we -- if we hark it back to the beginnings of the due process overlay on punitive damages, you might find an analogy there, and I would think probably having worked with that issue now for several years that there may well be a due process of implication and to [inaudible], I suppose that would be -- even if it got to the point where you would be putting people out of business and making the expressions for which they have been found liable and so appropriate to have -- to render them, you know, just simply ineffective --

JUDGE: Has that been raised --

MR. HATCHELL: But it's a -- that's a very difficult question --

JUDGE: Has that been raised here?

MR. HATCHELL: It's not been raised in this case. Its not -- but an intriguing question.

JUDGE: The Court of Appeals talks about truth as an affirmative defense. I know there's was no -- perhaps it is not an objection to the charge, but is that correct law after Gertz? Even though [inaudible] --

MR. HATCHELL: In Bell Sepino in Bell Sepino, your Honor, you -- the Court does hold the truth is a affirmative defense. Does the word affirmative add anything to that, I -- I think not, the way I viewed that, of course it's also statutory as well. The way I viewed that is what the Court of Appeals was holding was that it is a certainly our burden in the first instance to establish falsity and actual -- well, falsity that's as far it goes.

JUDGE: Okay.

MR. HATCHELL: If the defamation defendant wished to establish good counter with the truth, I think what the Court of Appeals is holding, it had to do so as a matter of law, because we established falsity and the jury thinks we found that. And if you're going to allege truth, as they did [inaudible]. It had to do so as a matter of law. And I don't read that statement any -- any beyond that.

JUDGE: Okay.

JUDGE: In -- in their scrutiny of the damages, the Court of Appeals make some reference to the need for a Judge to split the patient to be -- to be well regarded and high in the community because Judges don't have a power like a person with sword and they -- they [inaudible]. Do you think that -- that mind set is all affected to it? Was that part of the review standard of the Court of Appeals applied in looking at both liability issues and the particulars?

MR. HATCHELL: Not -- not into as far as I can tell for liability issues, no I don't, but certainly it was since 1956 as far as damages is concerned, because there was a specific finding an element of

damages on law to bring statement in [inaudible], but I do think that it is very relevant in this case which particularly assessing the degree of mental anguish that one can suffer and withstand. And I understand --

JUDGE: [inaudible] with New York Times on its head though? To say that public officials have -- they'll suffer more mental anguish if more people hear bad things about them and their job is so important that perhaps they need high rewards --

MR. HATCHELL: But of course --

JUDGE: -- when they're criticized, do you have any man exact clip or there are [inaudible] --

MR. HATCHELL: Well, I don't think --

JUDGE: -- jurisprudence?

MR. HATCHELL: Pardon me, your Honor. I don't think so, your Honor. Of course New York Times standard is -- is related to malice. I do think that this Court has struggled in Hartway and other cases to determine whether or not and if you develop test to determine whether or not mental anguish has been sustained. I think that can be a contextual inquiry. And so, I think given the high degree of public trust that this record shows that this may had that it was appropriate for the Court to say he had also suffered a light degree of mental anguish.

JUDGE: So it's harder to establish liability for a public figure, but once you do, it's easier to get -- to sustain large advantage --

MR. HATCHELL: I don't know what I would say easier, perhaps its -- perhaps its even harder because judges and I think Justice -- Judge Bentley even said on the stand that he had -- he understands he have to withstand, you know, certain amount of slings and arrows. But when you get to the point of corruption and criminality, I do think that there is a public policy overlay and undermining the entire system [inaudible] and certainly with someone that his record shows as such a dedicated public servant if there is a [inaudible] degree of mental anguish.

JUDGE: Thank you [inaudible].

JUDGE: The Court is ready to hear argument from respondents.

SPEAKER: May it please the Court, Mr. Robert D. Wren and Mr. Joe Ed Bunton will present argument for the respondents. Mr. Wren will open with the first ten minutes.

ORAL ARGUMENT OF ROBERT WREN ON BEHALF OF THE RESPONDENT

MR. WREN: May it please the Court, my name is Ronald Wren, I represent Colonel Gates. Let me start with the fact that, first of all, the jury didn't find that Colonel Gates made a false statement. The jury didn't find that he made a defamatory statement. The jury didn't find that he made a statement of fact at all. They were not asked that. We asked the Court to submit a straight line in definition and question as to Colonel Gates and court refused to do that. For the issue that was submitted was did he publish his agreement with Mr. Bunton's statement with actual malice, now, we have some serious problems for that charge formulation. Remember we -- first of all, as I indicated, they didn't meet several of the necessary elements of a defamation claim. There is no -- no requirement under this charge and the jury find it what Mr. Joe said was false and I think under Gertz, Chief

Justice Philips, that falsity is an element of a cause of action of the plaintiff in public figure case. It is not an affirmative defense irrespective of what it may be in a private figure or non-media defendant case. It also does not require that the statement be defamatory. If in fact, they are now contending that that what he said has a defamatory meaning then at least we ought to be given the opportunity under the charge to have the jury passed on that and the way this charge is submitted, a jury can find that he published his agreement with Mr. Bunton without finding actual amount -- without finding defamatory meaning at all --

JUDGE: Well, wasn't that found that it was defamatory per se? So, what would the jury have to pass on that anyway?

MR. WREN: Well, you're assuming that agreement with, makes my client vicariously liable to Mr. Bunton statement's --

JUDGE: Well, this is a different question, but if the statements were --

MR. WREN: -- which is a different question --

JUDGE: -- defamatory per se, you would eliminate that element of the crime, and it wouldn't be properly submitted to the fact finding, right?

MR. WREN: If it establishes as a matter of law that's correct. But in this case, I don't think agreement with is sufficient to establish vicarious liability, and if they are -- in most of their argument with respect to Colonel Gates --

JUDGE: I -- I don't understand the theory to be one of vicarious liability with respect to the jury questions that you're talking about. I mean, I heard Mr. -- Mr. Hatchell that he would be individually liable as a result of his conduct.

MR. WREN: As a result, no. If the damages that are awarded against -- against Colonel Gates [inaudible] of his charge are for the statements made by Mr. Bunton with which he agreed. It's not the publication of his agreement that cause for the damages. It is his liability for the statements that he agreed with that were made by Mr. Bunton --

JUDGE: Which as I understand Mr. Hatchell say, makes -- makes him individually liable for defamation --

MR. WREN: I disagree with that, I think it's a clearly vicarious liability standard. If in fact what you're saying is agreement with makes Mr. -- Colonel Gates liable for his publication of his agreement then why is it the damage question worded in terms of what he said and not Mr. Bunton? It's got to be a vicarious liability situation, the way the damage question is worded as to Colonel Gates, because he is held liable for the effects of the publication by Mr. Bunton not his own publication of his agreement.

JUDGE: But that can be the case of conspiracy to him --

MR. WREN: If you find conspiracy to establish damages resulting from conspiracy, but in this case there is a dispute as to what acts were or were not committed in furtherance to the conspiracy, and it is clear that at least some of the statements made by Mr. Bunton including the statement that Judge -- Judge Bentley was a criminal were not made in furtherance in the conspiracy because they predated the existence of any such conspiracy --

JUDGE: But if someone made [inaudible] why isn't that evidence to support the charge to [inaudible] verdict?

MR. WREN: Well, first of all the jury was not asked to award damages on a conspiracy theory. They were basically given a charge that said, Mr. Bunton made these statements in the act of actual malice,

what are the damages that result from those? Some of those clearly are not within the scope of the conspiracy, because if everybody admits they were made before Mr. Gates and Mr. Bunton even met and then there is an issue on Gates that says, if you find that you published his agreement with actual malice, what damages resulted to Judge Bentley as a result of Mr. Bunton's statement which -- which he published his agreement. The conspiracy issue is not picked up in any way, shape, or form in any of the damage question and the jury is not asked to determine what damage has flowed from the conspiracy --

JUDGE: Do you agree that Mr. Bunton's statement was defamatory per se?

MR. WREN: I agree clearly that his statement that the Judge Bentley is a criminal is defamatory per se, corrupt, it depends on how you interpret that statement, I'm not sure that's the per se your evaluation, but the judge concluded it was defamatory as a matter of law --

JUDGE: What would it take for the plea agreement to constitute conspiracy of the time someone else into another defamatory per se statement?

MR. WREN: Well, I think there has to be a showing that the defamatory statements and the damages resulting there from occurred in the furtherance of the conspiracy. Conspiracy as this Court in other states as recognized is not really -- is kind of misnomer. There is no cause of action simply for a civil conspiracy issue if the cause of action or damages caused by acts committed in furtherance of that conspiracy, and I think in this case what they needed to do if they wanted to support liability on the basis of a conspiracy finding, you submit a conspiracy damages issue, now --

JUDGE: Let me ask you, did anybody ask for that type of a charge in the damage [inaudible]?

MR. WREN: I don't believe anybody asked to that [inaudible] --

JUDGE: Well, isn't there a distinction between [inaudible] Randall and the Bell case which I think, they be relying on Bell [inaudible] --

MR. WREN: [inaudible] what the -- in [inaudible] there was no -- the defendants basically allowed without objection, kind of a joint submission against them, basically both actual and punitive damages. If you look at Justice [inaudible] on concurrence, he made clear that had they objected they would have been entitled to separate submission at least from the punitive damage point.

JUDGE: Well, but each co-conspirator was responsible for the actions of any of the other co-conspirator which was in furtherance of the unlawful condemnation then [inaudible] --

MR. WREN: -- that's if their language is in furtherance of the unlawful condemnation. Incumbent on him for that issue is disputed as to what is or is not within the scope of the conspiracy to establish what damages resulted from the conspiracy and failing --

JUDGE: [inaudible] the next statement which is citing [inaudible] is the concept is to extend liability in tort beyond the act of the wrongdoer which in your view is Mr. Bunton to go to the merely plainly assisted or encouraged his acts which would be your client Colonel Gates --

MR. WREN: Within the -- within his acts in furtherance of the conspiracy, if you read the Carol case, Carol specifically hold that you're not liable as a conspirator for acts by your co-conspirator not in furtherance of the conspiracy that --

JUDGE: So, your view then that they have any agreement is pretty crucial of basically the damage issue, is that right?

MR. WREN: I think that's clearly correct, and I think it is undisputed in the record that at least some of these defamatory statements were made prior to the time that Colonel Gates had any participation of a Q & A program and had -- had ever even met Mr. Bunton --

JUDGE: -- [inaudible] difference --

MR. WREN: No, I didn't [inaudible] --

JUDGE: [inaudible] --

MR. WREN: Some of the defamatory statements were made in June. Colonel Gates appeared on the program as a guest in July but didn't start participating as -- as an active participant program, so I think August and September --

JUDGE: Separate and apart from the timing question, Mr. Wren, you said that the damages that fall from -- from a conspiracy are the result of the acts. The two damage issues that were submitted in this case do ask what damages had -- were approximately caused by the acts of each of the defendants. Why isn't that sufficient? For those question separate and apart from the timing issue to support a liability for damages on a conspiracy theory --

MR. WREN: The damage issue against Mr. Bunton is not confined acts in furtherance to a conspiracy and in fact clearly includes that such as the statements of Judge Bentley that he's criminal --

JUDGE: I -- I understand in terms of the timing issue, but putting that apart because of the fact that he was not on the show from the beginning of the time that Mr. Bunton began making statement without Judge Bentley. My question is if we don't have that issue in the case, why aren't the two damage questions that asked what amount of damages were approximately caused by the bad acts? Why is that not sufficient to support an award of damages under the conspiracy theory of liability?

MR. WREN: First of all because the conspiracy issue is not tied to either one those damage issues. If you look at the PJC the way it submits conspiracy, it doesn't submit it as a separate issue and it's assuming the same assumption that you are making that all of the tortious conduct is in furtherance of the conspiracy, but it has a conditioning instruction that says, if you find in question one that the defendant is such and such and if you find in question two that these damages resulted then answer the conspiracy issue --

JUDGE: Well, is there any objection on this case for the failure to submit such an instruction?

MR. WREN: I don't believe so, your Honor, --

JUDGE: [inaudible]

MR. WREN: The Judge would basically determine the judge -- you can't recover on both -- both theories at the same time, I don't think that they can choose among theories of the judge would basically either make the plaintiff make an election just like you do in a case -- in any other case submitted under multiple theories or the judge would make that election for the plaintiff if they failed to do so in award them [inaudible] greatest amount of damages they're entitled to under the verdict.

Another problem with the conspiracy issue in this case is because --

JUDGE: Excuse me, Counsel, I believe [inaudible] --

MR. WREN: I'm sorry --

JUDGE: Two minutes has expired --

MR. WREN: Okay. Thank you, your Honor --

JUDGE: Are there any further questions? Thank you, Counsel.

ORAL ARGUMENT OF JOE ED BUNTON ON BEHALF OF THE RESPONDENT

MR. BUNTON: Sir and how the wall of the State of Texas, the Code of Judicial Conduct applies to those events, that's what's in dispute not the actual factual event that took place. The only one little dispute that took place was, it was in the case of Corbo case where at trial Judge Bentley brought out that there was an informal modification done, and I was not aware of that, but all of the facts that were reported on the air were actually true.

Now, what I did was give you a handout to try to just to point out that in the -- the finding the part that's colored -- in the finding there, there are mistakes by the Court of Appeals in the facts and in the determination of the law. I'll give one queer case of it. The Court of Appeals said that the special prosecutor on the removal petitions found no wrongdoing about Judge Bentley involved in that. In fact is when you read the record of the trial, you will find by Judge Bentley's testimony and Cindy Garner's testimony, she didn't investigate the two removal petitions. It had nothing to do with it.

There were three rules in removal petitions the ones that deal with corrupt about the local judges dismissing them without authority under 7440-59 of the Government Code are different from the third one. They're different, so they don't -- she cannot testify, and did not testify to that. So, there is a problem about the standard review on the -- on the falsity issue. One is the Court had the burden of proof on the defendants. Your Court just recently ruled in Turner that the burden of proof as the US Supreme Court is on the plaintiff.

JUDGE: How would you ever prove such a negative? If a statement were made that I were dishonest, are you saying I have to go prove that I was honest? Wouldn't that be an impossible standard to ever meet?

MR. BUNTON: No ma'am, I think where it goes to that if you have examples, in this -- in this case is we gave the viewer the program, the information to draw conclusions of their own. They had all the information and it is from those actual events that you draw a conclusion based on the standards and the Code of Judicial Conduct are on specific statutes that -- that is -- is dishonest or I mean in this case is corrupt and it would -- you know, it in a case like you're doing, like you pointed out, are you dishonest, you have to look at a specific event and see if that would be dishonest event. And it might be under some moral standards dishonest, but it not may not be unlawful 'cause that one of the definitions of -- of corrupt. You may do something not moral, but it may not be legal --

JUDGE: Did you ever say that Judge Bentley is a criminal?

MR. BUNTON: Yes sir. What I actually said, there is 24-second clip, and it is all in the evidence in the record. The only -- this kinda gets to the directive verdict on falsity that's improper, but there is only a 24-second clip and Judge Bentley in my testimony on that issue and the -- and it is actually one of the things that I asked the Court to look at. It is not actually a statement of fact, but it is -- in fact is a hyperbole. It was in the process of a phone conversation which the quips will not allow you. You cannot see the context and you cannot do as you did in Turner and rule on the defamatory as a whole, because you also didn't know 'cause the record don't include all the comments. So, you only get 24 seconds of this

comment, and it was kinda like in the schoolyard kicking up the dirt, "Hey, you sure it violated the law and you know about it? And you call in here say, Joe Ed ain't telling the truth. You all come in here. You all the ones are corrupt. You all are the criminals," and that's almost the verbatim quote of the 24 seconds --

JUDGE: The deal is that -- that jury heard evidence saying, on your part that Mr. Bentley was a criminal, correct?

MR. BUNTON: No sir, no sir --

JUDGE: The jury never heard any evidence --

MR. BUNTON: No sir, they heard the 24 seconds. They heard Judge Bentley explanation of it. They heard my explanation of it, and when you go to the standard that came out in Gonzales and Hertz which Justice O'Neill was involved be it on directive verdict, but it was on actual malice, this is on falsity, when those all of the evidence you have, you can only rule that there is probative question that that's not true --

JUDGE: Well, it is -- it is undisputed that you said that Judge Bentley was a criminal.

MR. BUNTON: Yes ma'am that is undisputed, and it is undisputed that I said he was corrupt.

JUDGE: Okay, but its undisputed that you said those things. Is there any -- was there any evidence or did you know one way or the other, whether or not Judge Bentley was criminal?

MR. BUNTON: Yes ma'am and I believe that and it's in --

JUDGE: Did you still -- but you still believe today that he is --

MR. BUNTON: -- 39 of the sheriff violated 39 --

JUDGE: Yes -- yes or no?

MR. BUNTON: Yes ma'am --

JUDGE: And what were you gonna say?

MR. BUNTON: The sheriff violated 3902 abuse of office because he has failed to put this prisoner with a warrant or in jail. Judge Bentley knew about that and under his role as a magistrate, he has authority. Now, the Court of Appeals is wrong in interpreting the law. They say he didn't have any jurisdiction. He had personal jurisdiction, and he had subject matter jurisdiction as a magistrate. And the case that really keys all of these is Justice Johnson who is now in the Fifth Circuit in a case called Welch v. United States and its queer that his duty as a magistrate, he had jurisdiction in -- in the Twelfth Court's opinion that there is no jurisdiction is wrong and he didn't need an indictment because it was official misconduct and misdemeanor which put by statute the jurisdiction --

JUDGE: Isn't your position that you said he was criminal --

MR. BUNTON: Yes sir --

JUDGE: That you believe he was criminal, therefore, there is no malice?

MR. BUNTON: Yes sir -- in his -- in his own of the backside of this is the timeline to show you what went on and that criminal charge actually came out from a phone call back in like February or March and through a long range investigation before that conclusion was drawn --

JUDGE: Let me ask you if -- if that is the case, would it be true if -- if we were to rule in your favor and all future cases that somebody can completely unequivocally engage in slander of someone by accusing anyone of being a criminal, but claim to genuinely hold fast to that belief that they really do believe they are criminal as a result always be able to evade any liability for slander --

MR. BUNTON: I -- I think we go to New York Times there about the reckless disregard actual malice issue about that, but in this case is

that -- that the evidence shows and what was brought in here is that when you look at all of the -- the parts that have to be taken to prove criminality, its -- its there and its supported by he knew about the law being violated, the law was violated, he had a duty to follow that if -- if he take the Fifth Circuit opinion and there's no affirmative defense for that --

JUDGE: Well, is it okay to say that somebody is a criminal even though there is no allegation pending in any criminal case --

MR. BUNTON: No --

JUDGE: -- even though a person may be found innocent --

MR. BUNTON: No, I think its not, if you don't have any facts you don't have any reason to believe -- the basis to believe it on, I think that would be clearly wrong if you just pulled it out of the air like in the Cantrell v. Forest City Publishing case, where the reporter talked about the way he being there, but he wasn't there. He made that up and that -- that is reckless disregard for truth without a doubt.

JUDGE: What about the statement to Mr. Farris that you've been unable to get anything on Bentley, isn't that some evidence to undermine your belief?

MR. BUNTON: It -- Justice O'Neill, it would be some evidence if they could pin down the time period. It could also be some evidence that this was a cautious investigation and if you listen to the video tape, you will hear me talked to a car on the air and it said it took a long time to get something that I had the confidence to go on the air with to talk about this. And this issue, Mr. Farris, and that's part of the reason for doing this charge was to show they don't have a clue when that took place and there's about three possibilities of courses of action that could come out of that, one of that was is the one they're arguing, the other one was I had the conversation with Mr. Farris prior to getting that firm belief have -- having no doubt that -- that was truthful --

JUDGE: So, the Court of Appeals -- the Court of Appeals' statement that the conversation occurred in December of 1995, is that -- where did that come from?

MR. BUNTON: That was Mr. Farris' conversation and that was his recollection that's the most he could pin it down and the -- they never asked on cross-examination to try to pin down that any -- any closer to get that to -- to more clear and direct when that actually took place. And what counters that is -- is that you have all of these other factual information about what happened. In the Farris converse is nothing, not criminal, not corrupt, found nothing. When you look at -- no matter how you judge the credibility, when you look at these issues --

JUDGE: But isn't that the point, we don't judge the credibility, it's the jury that does that and this testimony was properly before the jury, and how can we go behind the findings in that [inaudible] ?

MR. BUNTON: Well, its not just the credibility it's the -- it's the weight of all of the evidence not just the credibility of who testified on this, but when you look at the events that took place and you taped it against your Code of Judicial Conduct and that two events that were there were the case of the warrant in the case of Corbo and what the record shows very clearly was that Judge Bentley made an unlawful modification -- committed unlawful modification to the probation for Corbo and what also happened in that case is --

JUDGE: [inaudible] --

MR. BUNTON: -- that pended for two years --

JUDGE: [inaudible] Mr. Bunton was there a criminal statute that

you say makes it unlawful, I mean you -- you're asserting that if the judge makes a modification that you say is not permitted by law, there -- there is a criminal statute that is violated by that?

MR. BUNTON: No sir, that's not criminal. The only thing that criminal had to do with and it was only used once on June 6th in that 24 seconds clip. It's the only [inaudible] you're gonna find it in the evidence. What I was talking about the probation deal was about the issue of corrupt, the due process issue. And that is based on the Texas Court of Criminal Appeals opinions in DeLay v. the State and Women v. The State, where the Court very clearly states under 4212-5 and 10 that the courts cannot let somebody else modify the conditions of probation, it belongs to judge. There is one exception and that exception --

JUDGE: If the court did that that's error of law, but you're asserting that -- that is a violation of -- that is a criminal violation for which the judge can be arrested and sentenced to jail --

MR. BUNTON: No sir, no sir, go back. Criminal only deals with the warrant. It doesn't deal with the probation. It deals with the case of where the sheriff violated the law, and the judge knew about it. And the judge did nothing about it. In his defense on the stand, he testified --

JUDGE: And that makes it -- I'm --

MR. BUNTON: -- was that the sheriff --

JUDGE: I thought you said you called judge, I thought you made reference to Judge Bentley being criminal --

MR. BUNTON: Only in the case of the warrant --

JUDGE: But, so I've asked you, is failure to do whatever it is you said he was to do was that his failure a violation of a criminal statute --

MR. BUNTON: Yes, sir --

JUDGE: -- which he would be arrested for which he --

MR. BUNTON: -- yes sir --

JUDGE: -- was arrested --

MR. BUNTON: -- yes sir --

JUDGE: -- gets him to jail --

MR. BUNTON: -- yes sir --

JUDGE: I thought you said his violation was failing to do something to the sheriff.

MR. BUNTON: He has a duty under -- under Article 2.10 of the Code of Criminal Procedures as a magistrate which is backed up in the decision in Welch v. United States that -- and that's what happened in Welch. There was a justice of the peace up in Gregg County who knew of some criminal activity going on and did nothing about it, and he was prosecuted in federal court, but the court used the -- the state's statute as the basis of doing that and -- and this goes back to official misconduct, abuse of authority as if you have a duty and that's to do 2.10, and you fail to do that duty. And it's either intentional or willful. And it benefits somebody, there's benefit to it, but the statute does that, all three of those elements which are three of the four elements that are required in the Penal Code the proof of conviction for criminal act or their. The other one is that during that all sets that what I used in my argument is at the recent opinion in Tovar v. State where Justice [inaudible] that ignorance of the law is not a defense. It doesn't matter if you don't know you don't have a duty as -- as a judge to get involved in that. And the part where the Court of Appeals got way off based on this thing is they tried to focus on that Judge Bentley was supposed to put Mr. Harding back into jail, that wasn't the issue.

The issue is that the sheriff violated the law, Judge Bentley couldn't do anything in the Harding case because there is case law that the jurisdiction of Harding was in his brother-in-law's court. But in the case of the sheriff, he had jurisdiction. He knew it. And in defense on the stand was the sheriff has discretion. It's in the record. And that is not the law. And -- and ignorance is not an excuse.

JUDGE: Thank you.

MR. BUNTON: Yes sir.

REBUTTAL ARGUMENT OF MIKE HATCHELL ON BEHALF OF THE PETITIONER

JUDGE: Mr. Hatchell, the jury awarded \$7 million to Judge Bentley from Mr. Bunton from mental anguish damages. In a defamation case against a public figure, how that obviously which invokes First -- the First Amendment consideration. How should a court review a mental anguish damage award? And what are the parameters on that review?

MR. HATCHELL: I don't think that the Court should review the mental anguish damage award any different than it does under new standards. With possible exception of the due process overlay and where those parameters are, I don't know, I mean, I had studied the -- studied the entire line of Supreme Court cases, and I think it's probably a more on a case by case basis --

JUDGE: Well, is it a question of excessiveness? Is that what we're looking at? And so we're looking at factual sufficiency review?

MR. HATCHELL: I think it would, well, I think -- I think the Court is well aware that I coined the phrase excessive as a matter of law in -- in the case that Justice Baker is been on my case to some extent, so I -- I would think that perhaps, that phrase again in this case, excessive as a matter of law to the point that it violates due process, but where are those -- the ability to draw a bright line test for that, I think is very difficult --

JUDGE: Is -- is that something that this Court can do or would that be -- would it be necessary for the Court of Appeals to do, and would be restricted by the Constitutional limitations of factual sufficiency review?

MR. HATCHELL: Obviously, I think this Court keeps standards as it always does, and in the end would be up to the Court of Appeals with its exclusive jurisdiction to review that under this Court's [inaudible] --

JUDGE: But we could -- but we could make the determination that the award was so excessive that it violated the due process provision of the Constitution --

MR. HATCHELL: I don't think you could do that, no. I think you could set a standard that's -- that's says that a -- an award can be so excessive violation of due process and then have the Court of Appeals review under those standard --

JUDGE: [inaudible] --

JUDGE: [inaudible] looking at the [inaudible] any different from looking at clear and convincing --

MR. HATCHELL: Because I think that once you get beyond the constituent elements of defamation, I don't think that the clear and convincing standard applies 'cause I think that except to the -- I just don't think it applies --

JUDGE: But we would -- but we say we're not gonna look at clear

and convincing in any other context unless the Federal Constitution makes us.

MR. HATCHELL: Right.

JUDGE: But if it does and we've got to, even though we wouldn't otherwise, say the same thing about [inaudible] that you don't think the Constitution might have --

MR. HATCHELL: No, I don't think in so far as number one the fact of damages concern and excessiveness except to the extent that there might be a due process overlying. Which would candidly applies not only beyond defamation cases, I think, but it may have some heightened scrutiny in defamation cases because of what's implied.

JUDGE: Mr. Hatchell assume that somebody were to make a -- a very public allegation that President Clinton is a criminal, and is corrupt for pardoning Mark Rich and in fact is never found guilty of any criminal liability for that. Would that be -- subject the person who makes that allegation to liability for defamation and if not what is the difference between that case and this case?

MR. HATCHELL: I don't think there is any difference [inaudible] --

JUDGE: So, you think that somebody who is making allegations today that President Clinton is a criminal would be subject to potential liability --

MR. HATCHELL: If it were false. In this particular case, I think you should bear in mind that if there was not only an allegation that you're criminal, it says that you ought to be in jail and that implies to me that clear imputation of [inaudible] in jail felon, so to the --

JUDGE: Well, it seems that I had read in various newspaper claims to that extent and I heard TV claims to that extent with regards to President Clinton, are you saying that everyone who is making those allegations would be subject to liability?

MR. HATCHELL: If they're false. The implication that the crime is defamatory per se, if you're a criminal to me that imputes a crime. In this case, we do have the additional factor though that he tagged on you ought to be in jail which implies to me not just some generic derogatory comment, but a natural violation of state law.

JUDGE: [inaudible] --

MR. HATCHELL: Mr. Gates? The evidence regarding Mr. Gates is solved. You have to begin with the proposition that Mr. Gates admitted in discovery that he has never had any personal knowledge that Bascom Bentley was either corrupt or was a criminal. Never has he said that. There was a conversation that occurred before he assumed an active role in the program that he had with Judge Bentley and the subject of corruption and charges of criminality was specifically brought up and at that time, Mr. Gates agreed that the program needed to stop that, and he agreed that he was to going involved and quote clean it up and make it more responsible. And then when he testified on the stand on this case, he testified that he had warned Joe Ed Bunton that he would not use the words corrupt and criminal in describing Judge Bentley. Thereafter, however, he joined enthusiastically in saying, yeah, when Mr. Bunton would say that Judge Bentley was a criminal. He would ask him questions that said, "Who's the most corrupt?" Knowing of course that the words were gonna be Judge Bentley as the most corrupt and then when they --

JUDGE: [inaudible] Raphael or Chris Matthews try to encourage their guest to get more spirited in a debate they are in a risk of liability as of --

MR. HATCHELL: If the person that they are encouraging is uttering defamatory statements of the kind we have here, yes, I think so. So --

JUDGE: [inaudible]

MR. HATCHELL: -- your Honor, those -- those are at least three instances [inaudible] --

JUDGE: -- with factual malice too --

MR. HATCHELL: Yes --

JUDGE: With factual malice to try to [inaudible] I guess, well --

MR. HATCHELL: No, your Honor. No, that's -- no, we're not -- we're not talking about it in enthusiasm. We're talking about endorsement of defamatory statements that's are very vile in nature, corruption and criminality. Now, the restatement, you know, you just quite clear that you can -- you can publish a defamation by something other than words, gesture, pantomime, signs of the hand. If for example, if Mr. Bunton were issuing a [inaudible] of allegation of corruption and criminality and Mr. -- Jackie Gates were standing behind him going like this, I -- I genuinely believed that -- that can be a liable under restatement does too. I had given the Court a little chart in our petition for review in which we assume that Mr. Bunton publish it and has a billboard outside and we walked and say the Supreme Court of Texas are all corrupt and criminals and they need to be in jail. And Mr. Gates had a sign right next to it with an arrow pointing, and says I agree with every one of them. I believe that his liable, I believe that's a defamation.

JUDGE: Any other question? Thank you, Counsel

MR. HATCHELL: Thank you.

JUDGE: That completes the argument in the first case and the Court will take a brief recess.

SPEAKER: Will the audience please rise. Thank you ladies and gentlemen. We're in brief recess.

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