The Burger Court Opinion Writing Database

Bose Corp. v. Consumers Union of United States, Inc.

466 U.S. 485 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 11, 1983

No. 82-1246 - Bose Corp. v. Consumers Union of United States, Inc.

MEMORANDUM TO THE CONFERENCE:

Further consideration, particularly on the points Lewis made at Conference, persuades me to vote to affirm in this case.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 26, 1984

82-1246 - Bose Corp. v. Consumers Union

Dear John:

The dissent has given me a good deal of trouble and I conclude that I will join only in the judgment.

Regards,

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 14, 1984

Re: Bose Corp. v. Consumers Union, No. 82-1246

Dear John:

I agree.

Sincerely,

WJB/lab

WJB, Jr.

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

'84 MAR 28 A9:44

March 27, 1984

Re: 82-1246 -

Bose Corporation v. Consumers
Union of the United States, Inc.

Dear John,

I shall await the dissent in this case.

Sincerely,

Justice Stevens

Copies to the Conference

cpm

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: APR 20 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1246

BOSE CORPORATION, PETITIONER *v.* CONSUMERS UNION OF UNITED STATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[April ——, 1984]

JUSTICE WHITE, dissenting.

Although I do not believe that the "reckless disregard" component of the *New York Times* malice standard is a question of historical fact, I agree with JUSTICE REHNQUIST that the actual knowledge component surely is. Here, the District Court found that the defamatory statement was written with actual knowledge of falsity. The Court of Appeals thus erred in basing its disagreement with the District Court on its *de novo* review of the record. The majority is today equally in error. I would remand to the Court of Appeals so that it may perform its task under the proper standard.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 15, 1984

Re: No. 82-1246-Bose Corp. v. Consumers Union of United States

Dear John:

Please join me.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 23, 1984

Re: No. 82-1246 - Bose Corporation v.
Consumers Union of the United States, Inc.

Dear John:

Please join me.

Sincerely,

Harry

Justice Stevens

cc: The Conference

March 23, 1984

82-1246 Bose Corp. v. Consumers Union

Dear John:

I have now had an opportunity to read your opinion with some care. I am, of course, with you on the result and certainly with the greater part of your opinion.

In light of the Conference discussion today of Dun & Bradstreet (carried over for further consideration at next week's Conference), would it not be well to make somewhat clearer that this case involves only a media defendant? This is implicit throughout your opinion, but I do not recall a specific characterization of Consumers Union. Perhaps all that need be said is to add a few words on page 3. You refer there to the DC having ruled that Bose Corp. is a "public figure", and that therefore New York Times applies. I suggest that in 8th line, after the word "action" you might add: "against a media defendant".

I have delayed joining your opinion also because of some concern as to its emphasis. As you state, in this case "two well-settled and respected rules of law point in opposite directions". It is clear, of course, where a "public figure is suing a media defendant for libel, New York Times requires proof of actual malice. It also is clear that New York Times, and is progeny, require an appellate court to "make an independent examination of the whole record".

As you state (p. 13), our "standard of review must be faithful to both Rule 52(a) and the independent review of New York Times. My impression, however, as one reads your opinion, is that it leaves little room for the application of Rule 52(a) in any libel suit against the media. At Conference, Bill Brennan distinguished between the types of evidence that an appellate court reviews in a case of this kind. It usually is unnecessary literally to review the "entire record", but only such portions of it as relate to the constitutional facts. In this case, for example, the

bench trial lasted 19 days. There must be many facts, irrelevant to the constitutional standard of New York Times, that are subject to Rule 52(a). I am sure you would agree. It would be helpful if this were made explicitly clear in our opinion.

We should take care, I think, not to write this case in a way that weakens the application of Rule 52(a) in other types of cases or in libel cases with respect to non-constitutional facts. The Court of Appeals characterized its duty as being that of "de novo" review. Should we not state that CA1 was incorrect in characterizing the New York Times standard of review as "de novo". Perhaps you have said this, though I do not recall having seen it.

If modest changes like these are made I will be happy to join you.

Sincerely,

Justice Stevens

lfp/ss

March 27, 1984

82-1246 Bose Corp. v. Consumers Union

Dear John:

The proposed additions to your opinion are excellent, and with these added I will be happy to join you.

I appreciate your willingness to make the changes.

Sincerely,

Justice Stevens

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 27, 1984

82-1246 Bose Corp. v. Consumers Union

Dear John:

Please join me.

Sincerely,

L. Lewis

Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 14, 1984

Re: No. 82-1246 Bose Corp. v. Consumers Union of United States

Dear John:

In due course I will circulate a dissent.

Sincerely,

WHR

Justice Stevens

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: 4/12/84

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1246

BOSE CORPORATION, PETITIONER *v.* CONSUMERS UNION OF UNITED STATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[April ——, 1984]

JUSTICE REHNQUIST, dissenting.

There is more than one irony in this "Case of the Wandering Instruments," which subject matter makes it sound more like a candidate for inclusion in the "Adventures of Sherlock Holmes" than in a casebook on constitutional law. It is ironic in the first place that a constitutional principle which originated in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964) because of the need for freedom to criticize the conduct of public officials is applied here to a magazine's false statements about a commercial loudspeaker system.

It is also ironic that, in the interest of protecting the First Amendment, the Court rejects the "clearly erroneous" standard of review mandated by Fed. Rule of Civ. Proc. 52(a) in favor of a "*de novo*" standard of review for the "constitutional facts" surrounding the "actual malice" determination. But the facts dispositive of that determination— actual knowledge or subjective reckless disregard for truth— involve no more than findings about the mens rea of an author, findings which appellate courts are simply ill-prepared to make in any context, including the First Amendment context. Unless "actual malice" now means something different than the definition given to the term 20 years ago by this Court in *New York Times*, I do not think that the constitutional requirement of "actual malice" properly can bring into play any

pp 3+4

RECEIVED
SUPREME COURT U.S.
JUSTICE

'84 APR 16 A11:32

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: _____

Apr 14 '84

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1246

BOSE CORPORATION, PETITIONER *v.* CONSUMERS UNION OF UNITED STATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[April ——, 1984]

JUSTICE REHNQUIST, dissenting.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: MAR 13 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1246

BOSE CORPORATION, PETITIONER *v.* CONSUMERS UNION OF UNITED STATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[March ——, 1984]

JUSTICE STEVENS delivered the opinion of the Court.

An unusual metaphor in a critical review of an unusual loudspeaker system gave rise to product disparagement litigation that presents us with a procedural question of first impression: Does Rule 52(a) of the Federal Rules of Civil Procedure prescribe the standard to be applied by the Court of Appeals in its review of a District Court's determination that a false statement was made with the kind of "actual malice" described in *New York Times* v. *Sullivan*, 376 U. S. 254, 279–280 (1964)?

In the May 1970 issue of its magazine, "Consumer Reports," respondent published a seven-page article evaluating the quality of numerous brands of medium priced loudspeakers. In a boxed-off section occupying most of two pages, respondent commented on "some loudspeakers of special interest," one of which was the Bose 901—an admittedly "unique and unconventional" system that had recently been placed on the market by petitioner.[1] After describing the system and some of its virtues, and after noting that a listener "could pinpoint the location of various instruments much more easily

[1] In introducing the loudspeaker system to the marketplace, petitioner emphasized the unconventional nature of the system and actively solicited reviews in numerous publications thereby inviting critical evaluation and comment on the unique qualities of the system. 508 F. Supp. 1249, 1273 (D. Mass. 1981).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 26, 1984

Re: 82-1246 - Bose Corp. v. Consumers Union

Dear Lewis:

Many thanks for your letter. As always, your suggestions make good sense. I propose to add these two footnote:

1) Insert as new ¶ in fn. 8 on p. 6:

> We observe that respondent's publication of Consumer Reports plainly would qualify it as a "media" defendant in this action under any conceivable definition of that term. Hence, the answer to the question presented in Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., certiorari granted, ____ U. S. ____ (1983) could not affect this case and we naturally express no view at this time on that question.

2) Insert as fn. 31 on p. 27:

> There are, of course, many findings of fact in a defamation case that are irrelevant to the constitutional standard of New York Times v. Sullivan and to which the clearly erroneous standard of Rule 52(a) is fully applicable. Indeed, it is not actually necessary to review the "entire" record to fulfill the function of independent appellate review on the actual malice question; rather, only those portions of the record which relate to the actual malice determination must be independently assessed. The independent review function is not equivalent to a "de novo" review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff. If the reviewing Court determines that actual malice has been established with

convincing clarity, the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact. Although the Court of Appeals stated that it must perform a de novo review, it is plain that the Court of Appeals did not overturn any factual finding to which Rule 52(a) would be applicable, but instead engaged in an independent assessment only of the evidence germane to the actual malice determination.

Do you think these changes will be adequate?

Respectfully,

Justice Powell

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 3, 4, 23, 26, 28

From: **Justice Stevens**

Circulated: _____

Recirculated: MAR 27 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1246

BOSE CORPORATION, PETITIONER *v.* CONSUMERS UNION OF UNITED STATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[March ——, 1984]

JUSTICE STEVENS delivered the opinion of the Court.

An unusual metaphor in a critical review of an unusual loudspeaker system gave rise to product disparagement litigation that presents us with a procedural question of first impression: Does Rule 52(a) of the Federal Rules of Civil Procedure prescribe the standard to be applied by the Court of Appeals in its review of a District Court's determination that a false statement was made with the kind of "actual malice" described in *New York Times* v. *Sullivan*, 376 U. S. 254, 279–280 (1964)?

In the May 1970 issue of its magazine, "Consumer Reports," respondent published a seven-page article evaluating the quality of numerous brands of medium priced loudspeakers. In a boxed-off section occupying most of two pages, respondent commented on "some loudspeakers of special interest," one of which was the Bose 901—an admittedly "unique and unconventional" system that had recently been placed on the market by petitioner.[1] After describing the system and some of its virtues, and after noting that a listener "could pinpoint the location of various instruments much more easily

[1] In introducing the loudspeaker system to the marketplace, petitioner emphasized the unconventional nature of the system and actively solicited reviews in numerous publications thereby inviting critical evaluation and comment on the unique qualities of the system. 508 F. Supp. 1249, 1273 (D. Mass. 1981).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 18, 1984

Re: 82-1246 - Bose Corp. v. Consumers Union

Dear Bill:

In response to your dissent, I will make the following addition to footnote 27 on page 23 of my circulating draft:

> The intermingling of law and fact in the actual malice determination is no greater in state or federal jury trials than in federal bench trials. See supra at 13, and infra at 26-27. And, of course, the limitation on appellate review of factual determinations under Rule 52(a) is no more stringent than the limitation on federal appellate review of a jury's factual determinations under the Seventh Amendment, which commands that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

It seems to me that the logic of the argument you make requires overruling not only Time, Inc. v. Pape but New York Times v. Sullivan as well.

Respectfully,

Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: APR 19 1984

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 23

3rd
~~2nd~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82–1246

BOSE CORPORATION, PETITIONER *v.* CONSUMERS UNION OF UNITED STATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[April ——, 1984]

JUSTICE STEVENS delivered the opinion of the Court.

An unusual metaphor in a critical review of an unusual loudspeaker system gave rise to product disparagement litigation that presents us with a procedural question of first impression: Does Rule 52(a) of the Federal Rules of Civil Procedure prescribe the standard to be applied by the Court of Appeals in its review of a District Court's determination that a false statement was made with the kind of "actual malice" described in *New York Times* v. *Sullivan*, 376 U. S. 254, 279–280 (1964)?

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[1] In introducing the loudspeaker system to the marketplace, petitioner emphasized the unconventional nature of the system and actively solicited reviews in numerous publications thereby inviting critical evaluation and comment on the unique qualities of the system. 508 F. Supp. 1249, 1273 (D. Mass. 1981).

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1246

BOSE CORPORATION, PETITIONER *v.* CONSUMERS UNION OF UNITED STATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[April ——, 1984]

JUSTICE STEVENS delivered the opinion of the Court.

An unusual metaphor in a critical review of an unusual loudspeaker system gave rise to product disparagement litigation that presents us with a procedural question of first impression: Does Rule 52(a) of the Federal Rules of Civil Procedure prescribe the standard to be applied by the Court of Appeals in its review of a District Court's determination that a false statement was made with the kind of "actual malice" described in *New York Times* v. *Sullivan*, 376 U. S. 254, 279–280 (1964)?

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[1] In introducing the loudspeaker system to the marketplace, petitioner emphasized the unconventional nature of the system and actively solicited reviews in numerous publications thereby inviting critical evaluation and comment on the unique qualities of the system. 508 F. Supp. 1249, 1273 (D. Mass. 1981).

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 9, 1984

MEMORANDUM FOR THE CONFERENCE

Re: Cases Held for Bose Corp. v. Consumers Union, 82-1246

Two petitions have been held for Bose--Graves v. Lexington Herald-Leader Co., 83-619 and Field Communications Corp. v. Braig, 83-502 (both on p. 19 of the May 10 Conference List)--and I relisted a third petition from the last Conference list--Macon Telegraph Pub. Co. v. Elliott, 83-1219 (on p. 17 of the May 10 Conference list)--which should be considered in light of Bose.

1. In Graves v. Lexington Herald-Leader Co., 83-619, petitioner obtained a verdict against respondent newspaper for damages caused by a defamatory story respondent printed. The Kentucky Supreme Court recognized that it had a duty under the First Amendment to examine the evidence for itself and see if malice was proved with convincing clarity. Independently reviewing the record, the court concluded that it lacked the clear and convincing evidence required to establish actual malice and reversed the judgment. Petitioner complains that the court exercised an impermissible scope of review. Moreover, petitioner contends that the court departed from the definition of actual malice previously announced by this Court and argues on the merits of the actual malice question that the record contains clear and convincing evidence of actual malice. The scope of review exercised was entirely proper under Bose, and the court properly held that petitioner was required to establish that the author had serious doubts as to the truth of his publication in order to establish reckless disregard of the truth. Indeed, the court's analysis of this question is remarkably similar to our analysis in Bose, recognizing that petitioner's theory of actual malice was tantamount to allowing the false statements themselves to prove actual malice. I will vote to DENY the petition.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 17, 1984

No. 82-1246 Bose Corporation v. Consumers Union of United States, Inc.

Dear John,

I voted at Conference to affirm tentatively. After reading the dissent, my views are now clarified and I have decided to join it rather than the Court's opinion.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 17, 1984

No. 82-1246 Bose Corporation v. Consumers Union of United States, Inc.

Dear Bill,

Please join me in your dissent.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference