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NEWTON v. NBC: FIRST AMENDMENT BIG WINNER IN PUBLIC FIGURE DEFAMATION ACTION

I. INTRODUCTION

The United States Supreme Court defines public figures in part as "[t]hose who, by reason of the notoriety of their achievements . . . seek the public's attention,"[1] and therefore, "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."[2] As a result, courts have reviewed public figures' allegations of defamation with greater scrutiny than they have the claims of private individuals.[3] Despite an apparent trend to reduce the first amendment's scope of protection,[4] the courts have consistently given greater protection to the right of free speech than they have given to the opposing interest of defending the reputations of public figures. Arguably, the judiciary's interest in insuring the media's ability to write and publish free of risk has emasculated to some degree the seventh amendment guarantee of deference to the factfinding role of the jury.

Defamation, which comprises the twin torts of libel and slander,[5] is best defined as a communication which "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[6] Consistent with the general principle of tort law that remedies are to be liberally pro-

1. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

2. *Id.* at 345.

3. The term *private individual* will hereinafter refer to persons who are not public figures.

4. Many recent events indicate that the country may be leaning towards a more conservative and orthodox future. These include the controversy over the obscene lyrics of recording group the 2 Live Crew, *see* R. Corliss, *X-Rated,* TIME, May 7, 1990, at 92-99; the public uproar concerning a Cincinnati art museum's display of Robert Mapplethorpe's art, *see* D. Gates, *The Mapplethorpe Furor Erupts Again,* NEWSWEEK, Apr. 9, 1990, at 72; the Right to Life movement and other anti-abortion campaigns, *see* L.A. Times, Apr. 15, 1990, at A1, col. 2; and the refusal of the Motion Picture Ass'n of America to create a new film rating for "Adult" movies, *see* R. Corliss, *X-Movies,* TIME, May 7, 1990, at 97.

5. W. KEETON, PROSSER & KEETON ON TORTS § 111, at 771 (5th ed. 1984). *See also* RESTATEMENT (SECOND) OF TORTS § 568 (1977):

> (1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication which has the potentially harmful qualities characteristic of written or printed words.
>
> (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).

6. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

vided,[7] the traditional plaintiff only needs to satisfy three requirements to establish a prima facie case for defamation: that the defendant (1) communicated to a third person a statement that was (2) defamatory (3) of and concerning the plaintiff.[8]

Public figures, however, must meet a higher standard of proof. As opposed to private individuals, who tend to their own personal affairs, public figures seek the public's attention,[9] and are consequently not as deserving of recovery.[10] In *New York Times Co. v. Sullivan* ("*New York Times*"),[11] the Supreme Court held that public officials[12] must show that a defamatory 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."[13] *Newton v. National Broadcasting Co., Inc.*[14] ("*Newton*"), which reverses a Las Vegas, Nevada jury's libel damage award to singer Wayne Newton,[15] demonstrates the difficulty that a public figure such as Newton faces in trying to prove defamation under the heightened standard of *New York Times.* This Note briefly traces the development of the public figure standard in defamation law and analyzes the recent decision in *Newton,* concluding that the Ninth Circuit Court of Appeals correctly reversed the lower court's decision by applying the rigorous scrutiny compelled by *New York Times.*

II. EVOLUTION OF PUBLIC FIGURE DEFAMATION AFTER *NEW YORK TIMES*: THE ACTUAL MALICE STANDARD AND THE REQUIREMENT OF INDEPENDENT APPELLATE REVIEW

A. The Definition of "Actual Malice"

Three years after its landmark decision in *New York Times*, the Supreme Court held that

> the *New York Times* test should apply to criticism of "public

7. Note, *The Art of Insinuation: Defamation by Implication,* 58 FORDHAM L. REV. 677, 678 n.11 (1990).

8. W. KEETON, *supra* note 5, § 113 at 797, 802.

9. *Gertz,* 418 U.S. at 342.

10. *Id.* at 345.

11. 376 U.S. 254 (1964).

12. A public *official* is a type of public figure. *See infra* note 16 and accompanying text.

13. New York Times, 376 U.S. at 279-280.

14. 1990 U.S. App. LEXIS 15265 (9th Cir. 1990). The opinion was initially assigned the citation of 913 F.2d 652. By the time volume 913 of the Federal Reporter, Second Series was published, the opinion had been withdrawn. As a result, subsequent references to this case will be designated by its LEXIS citation. The reason for the appellate decision's withdrawal is addressed *infra* in part VI.

15. Newton v. National Broadcasting Co., Inc., 677 F. Supp. 1066 (D. Nev. 1987).

> figures" as well as "public officials," [and it therefore] extended the constitutional privilege announced in that case to protect defamatory criticism of non-official public figures who ". . . by reason of their fame, shape events in areas of concern to society at large."[16]

Specifically, *New York Times* precludes a public official from recovering damages for a defamatory statement concerning his official conduct unless he shows that the statement was made with knowledge of its falsity or with a reckless disregard for the truth.[17] Yet a "reckless disregard" for the truth has been deemed a subjective standard and "requires more than a departure from reasonably prudent conduct."[18] The Court has held that evidence must exist sufficient to suggest that the public defamation defendant "in fact entertained serious doubts as to the truth of his publication,"[19] or had a "high degree of awareness of . . . probable falsity."[20] Consequently, failure to investigate before publishing, even when reasonably prudent to do so, is not sufficient to establish reckless disregard.[21] On the other hand, recklessness may arise where there are obvious grounds to question a source's information.[22]

B. Appellate Court's Duty of Independent Review

Generally, in non-first amendment cases appellate courts must defer to the factual findings of a jury unless those findings are clearly erroneous.[23] In first amendment cases, however, jury conclusions receive more scrutiny. *New York Times* mandated that in public official defamation cases, reviewing courts must independently examine the entire trial record to ascertain that jury findings of actual malice do not encroach upon the kind of speech protected by the first amendment.[24] In particular the Court sought to give substance to the promises of the first amendment by extending to the media the right to freely disseminate information and ideas, including the privilege to criticize the government.[25] Consequently, the Court required that public officials prove actual malice with

16. *Gertz*, 418 U.S. at 336-337 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 162, 164 (1967) (Warren, C.J., concurring)).

17. *New York Times*, 376 U.S. at 279-280.

18. Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678, 2696 (1989).

19. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

20. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

21. *See Harte-Hanks*, 109 S. Ct. at 2696; *St. Amant*, 390 U.S. at 731.

22. *Harte-Hanks*, 109 S. Ct. at 2696 (quoting *St. Amant*, 390 U.S. at 732).

23. FED. R. CIV. P. 52(a). *See infra* notes 95-97 and accompanying text.

24. *See New York Times*, 376 U.S. at 285 (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).

25. Gertz, 418 U.S. at 342 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

convincing clarity,[26] a touchstone consistently applied in other cases.

In *St. Amant v. Thompson* ("*St. Amant*"),[27] the Court employed the *New York Times* standard to reverse a damage award to a county law enforcement officer.[28] In a ruling which preceded the *New York Times* decision, the trial judge in *St. Amant* found that in a televised speech a local politician falsely charged a Louisiana deputy sheriff with criminal conduct.[29] The Supreme Court reversed the lower court's decision, holding that the deputy failed to show the politician was aware of the probable falsity of his statement.[30]

Six years later, in *Gertz v. Robert Welch, Inc.* ("*Gertz*"),[31] the Supreme Court held the *New York Times* standard inapplicable to the libel suit of a private individual[32] but nevertheless asserted the standard's important role regarding public figures. The case arose when Robert Welch, Inc., the publisher of an ultra conservative magazine, printed an article which denounced attorney Elmer Gertz as a "Communist-fronter."[33] Although Gertz was an accomplished lawyer, the Court found that he had not attained widespread public acclaim.[34] The Court held that without clear evidence of general community recognition and significant community involvement, a person could not be considered a public figure.[35]

The *Gertz* Court thus provided a working definition for a public figure.[36] More importantly, however, the Court emphasized the precision with which a public figure must demonstrate actual malice. As a result, *Gertz* furnished the description of the *New York Times* standard which has been most commonly used in other cases: to prevail in an action for defamation a public figure must prove actual malice by *clear and convincing* evidence.[37]

More recently, *Bose Corp. v. Consumers Union of the United States*[38] ("*Bose*") reiterated the *New York Times* rule in distinguishing between

26. *New York Times*, 376 U.S. at 285-286.
27. 390 U.S. 727 (1968).
28. *Id.* at 731-733.
29. *Id.* at 728-729.
30. *Id.* at 732-733.
31. 418 U.S. 323 (1974).
32. *Id.* at 352.
33. *Id.* at 326.
34. *Id.* at 351-352.
35. *Id.* at 352.
36. *Gertz*, 418 U.S. at 342-345. *See supra* text accompanying notes 1-2.
37. *Gertz*, 418 U.S. at 342 (emphasis added).
38. 466 U.S. 485 (1984).

proof of actual malice and proof of mere falsity.[39] In the case Bose contended that the comment in Consumers Union's monthly magazine that "individual instruments heard through the Bose [loudspeaker] system . . . tended to wander about the room"[40] was a " 'false' statement of 'fact.' "[41] The Court held that the defendant's choice of words did not manifest clear and convincing evidence of actual malice.[42] The alleged inaccuracy of the comment notwithstanding, the fact that Consumers Union refused to admit any error failed to support the notion that it was aware of the inaccuracy when the magazine was published.[43]

Finally, in deciding *Harte-Hanks Communications, Inc. v. Connaughton ("Harte-Hanks")*,[44] the Sixth Circuit Court of Appeals and United States Supreme Court both required a candidate for a Hamilton, Ohio municipal judgeship to provide clear and convincing evidence of actual malice in his libel suit against a local newspaper.[45] The newspaper, published by Harte-Hanks Communications, ran a story which quoted grand jury witness Alice Thompson as saying that during the campaign, Connaughton had used "dirty tricks" to induce her and her sister to testify against one of the incumbent's agents.[46] The jury agreed with Connaughton's claim that the article was false and found that it was published with actual malice.[47] After independently reviewing the entire trial record, the Sixth Circuit affirmed, finding that the lower court's judgment did not contravene first amendment rights of free expression.[48] In its own independent review, the Supreme Court ruled that the newspaper's reasons for failing to interview Thompson's sister, a key grand jury witness, were not credible.[49] As a result, the Court held that:

> it is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's [testimony]. Although failure to investigate will not alone support a finding of actual malice, the *purposeful avoidance* of the truth is in a different category.[50]

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39. *Id.* at 511 n.30.
40. *Id.* at 488.
41. *Id.* at 490.
42. *Id.* at 512.
43. *Bose*, 466 U.S. at 512.
44. 109 S. Ct. 2678 (1989).
45. *Harte-Hanks*, 109 S. Ct. at 2697; 842 F.2d 825, 847 (6th Cir. 1988).
46. *Harte-Hanks*, 109 S. Ct. at 2682.
47. *Id.*
48. *Id.* (quoting *Harte-Hanks*, 842 F.2d at 828).
49. *Id.* at 2698.
50. *Id.* (citation omitted and emphasis added).

The clear and convincing burden of proof required by *New York Times* in public figure defamation cases calls for more exacting evidentiary findings than does the preponderance of evidence standard usually applied in civil lawsuits.[51] This heightened standard illustrates the court's desire to create an environment where ideas are freely disseminated and open debate is encouraged. Accordingly, by employing the clear and convincing requirement in *Newton,* the Ninth Circuit Court of Appeals explicitly underscored the esteem with which it held the promises of the first amendment.

III. BACKGROUND OF *NEWTON V. NATIONAL BROADCASTING CO., INC.*

On October 6, 1980, National Broadcasting Company, Inc. ("NBC") televised a three-and-one-half minute report called "Wayne Newton and the Law" on the NBC Nightly News. In addressing Newton's relationship with certain Mafia figures, the newscast related that Newton's purchase of the Aladdin hotel-casino in Las Vegas was under investigation due to federal authorities' suspicions that the mob had acquired a hidden interest in the Aladdin after assisting Newton with an "unspecified problem."[52]

Wayne Newton is one of Las Vegas' top performers, commanding up to $250,000 a week for his nightclub act.[53] In late November, 1980, Nevada's State Gaming Board approved the bid of Newton and a partner to purchase the Aladdin Hotel for $85 million.[54] According to NBC, a federal grand jury was looking into the Aladdin deal because of questions surrounding Newton's financial health.[55] Apparently, some time before Newton revealed his intention to buy the Aladdin, Newton ran into a problem for which he enlisted the assistance of Guido Penosi, a long-time criminal with ties to the Gambino Mafia family.[56] Whatever the problem was, NBC declared that "it was important enough for Penosi to take it up with the Gambino family in New York."[57] Police said that Penosi's mob boss, Frank Piccolo, "told associates that he had taken care of Newton's problem and had become a hidden partner in the Aladdin hotel

51. *Newton,* 1990 U.S. App. LEXIS 15265 at 15 n.9.

52. L.A. Times, Aug. 31, 1990, at A35, col. 2.

53. *Newton,* 1990 U.S. App. LEXIS 15265 at 3 (quoting from transcript of NBC Nightly News broadcast, Oct. 6, 1980).

54. *Id.* at 3-4.

55. *Id.* at 4.

56. *Id.*

57. *Id.*

deal."[58]

In addition, the broadcast conveyed that Newton had lied while under oath. At his hearing with the State Gaming Board, Newton testified that he had no hidden partners, and although he knew Guido Penosi, the two were merely friends.[59] NBC reported that federal authorities suspect that "Newton is not telling the whole story."[60]

Finally, the story disclosed that Penosi, in an interview with NBC, denied knowing "anyone named Wayne Newton."[61] Nevertheless, the report explained that federal authorities were aware of at least eleven phone calls Penosi made to Newton's house over a two-month period.[62] The broadcast added that Penosi's relationship with Newton and other entertainment figures was part of a large-scale Federal Bureau of Investigation ("FBI") study of the role that East Coast mob money plays in the entertainment business of Las Vegas and Hollywood.[63]

Newton, having watched the broadcast at home, "interpreted the broadcast as saying he had received financing for [the Aladdin purchase] through the mob," and recalled "being 'shocked' and 'devastated,' " unable to believe that " 'people could portray such a vicious lie.' "[64] Six months later, on April 10, 1981, Wayne Newton brought a defamation action against NBC and three of its journalists[65] in Nevada's federal district court in Las Vegas.

A. Facts of the Case

Specifically, Newton claimed that the October 6 broadcast, in addition to two subsequent broadcasts pertaining to the grand jury investigation, falsely conveyed the impression that the Mafia helped Newton buy the Aladdin in exchange for a hidden share of the hotel-casino.[66] Furthermore, the broadcast related that Newton, while under oath, misled Nevada state gaming authorities about the nature of his association with the Mafia.[67] NBC moved for summary judgment and a change of venue from Las Vegas, the venue in which Newton had filed suit. Although

58. *Newton*, 1990 U.S. App. LEXIS 15265 at 4.
59. *Id.*
60. *Id.*
61. *Id.* at 5.
62. *Id.*
63. *Newton*, 1990 U.S. App. LEXIS 15265 at 5.
64. Goldner, *"Danke Schoen," Las Vegas*, THE AM. LAWYER, March 1987, at 73.
65. Brian Ross, the reporter; Ira Silverman, the field producer; and Paul Greenberg, the executive producer. *See Newton*, 1990 U.S. App. LEXIS 15265 at 5.
66. *Newton*, 1990 U.S. App. LEXIS 15265 at 5.
67. *Id.* at 5-6.

NBC established that its statements were either true or protected under the common law privilege of fair reporting,[68] its motion for summary judgment was denied on the ground that the jury could find that the NBC broadcasts had left a defamatory impression about Newton.[69] The district court also denied the motion for a change of venue.

In his jury instructions, the trial judge described the following impressions possibly conveyed by the NBC broadcasts:

> (1) Financing of Newton's purchase of the Aladdin was obtained by and through Mafia and mob sources, and that Newton holds a hidden ownership interest in the Aladdin for the benefit of said Mafia and mob sources.
>
> (2) Newton is associated with mobster Guido Penosi but has not told Nevada gaming authorities the entire truth surrounding the relationship.
>
> (3) While visually depicting Newton testifying under oath before the Nevada State Gaming Board, NBC discussed the nature of the testimony, indicating that federal authorities claim Newton is not telling whole story.[70]

The jury returned a special verdict, finding all four defendants liable for defaming Newton.[71] In particular, the jury found that certain statements about Newton borne by the broadcasts were factual in nature and false.[72] Moreover, the jury felt that the journalists "intended to convey a false or defamatory impression about Newton with knowledge of falsity or serious subjective doubt about the truth of the impression."[73] As a result, the "blue-collar jury,"[74] which was composed of Newton's "adoring hometown fans,"[75] awarded the singer $19.3 million in compensatory and punitive damages — the largest punitive award for defamation on record.[76]

B. The District Court Decision

NBC moved for judgment notwithstanding the verdict and in the alternative for a new trial on the basis that Newton failed to prove by clear and convincing evidence that the broadcasts in question were aired

68. *Id.* at 7.
69. *Id.*
70. *Id.* at 6 n.2.
71. *Newton,* 1990 U.S. App. LEXIS 15265 at 7.
72. *Id.* at 7.
73. *Id.* at 7-8.
74. Goldner, *supra* note 64, at 75.
75. *Id.* at 73.
76. L.A. Times, Aug. 31, 1990, at A3, col. 2.

with actual malice.[77] In its review of the evidence, however, the district court upheld the jury's verdict of liability, finding that the broadcast had left the clear and inescapable impression that since Newton lacked the money to buy the Aladdin Hotel, he called his friend Guido Penosi for financial help.[78] In exchange for his help, Penosi, who had ties to organized crime, obtained a hidden interest in the Aladdin Hotel.[79]

The district court further ruled that NBC knew this impression was defamatory[80] for a number of reasons. First, by accusing Newton of giving the Mafia a hidden interest in the Aladdin, NBC essentially charged Newton with breaking the law, and such accusatory statements are defamatory.[81] Second, defendants Ross and Silverman[82] had attended Newton's hearing before the Nevada Gaming Board, where the Valley Bank of Nevada established that *it had provided money* for Newton to purchase the Aladdin.[83] Finally, testimony during the trial revealed that Newton had called Penosi because of death threats to his daughter and himself.[84] Although defendants maintained that they did not intend for the broadcasts to convey a defamatory impression, the district court ruled that Newton demonstrated that the defendants had serious subjective doubts as to the truth of the broadcasts and could not therefore escape liability.[85]

The district court also upheld the jury's awards of damages for pain and suffering and punitive damages but sharply reduced the damages awarded on other grounds. It set aside the $5 million awarded Newton for damage to reputation, holding that the award shocked the conscience of the court since the broadcasts did not taint Newton's reputation.[86] The district court also set aside the jury's award of $9,046,750 for Newton's claims of lost past and future income, concluding that Newton failed to prove by a preponderance of the evidence that the broadcasts had any correlation to any alleged lost income.[87] Lastly, the court held that unless Newton filed a remittitur of all sums except $225,000 for physical and mental injury, $50,000 as presumed damages to reputation, and $5,000,000 in punitive damages, the court would order a new trial in

77. *Newton*, 677 F. Supp. at 1067.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* *See generally* W. KEETON, *supra* note 5, § 112, at 788-790.
82. *See supra* note 65.
83. *Newton*, 677 F. Supp. at 1067.
84. *Id.* at 1068.
85. *Id.*
86. *Id.*
87. *Id.* at 1069.

the Central District of California.[88] Faced with the prospect of a new trial outside of Las Vegas, Newton filed the remittitur. After final judgment for $5.275 million was entered on February 10, 1989, NBC timely appealed.[89]

IV. THE APPEAL BEFORE THE NINTH CIRCUIT COURT OF APPEALS

Although NBC raised a multitude of issues in its appeal,[90] the Ninth Circuit found that the issue of actual malice disposed of the case in its entirety and eliminated the need to address the other issues.[91] During the trial Newton strongly disputed his status as a public figure, but his efforts failed to convince the district court.[92] Consequently, by the time the case reached the appellate level, Newton was basically forced to concede that he is a public figure as the term is defined in *Gertz*. As a result, the first amendment would preclude recovery unless Newton produced clear and convincing evidence that NBC and its journalists uttered a false, defamatory statement about Newton with actual malice.[93]

A. Determining the Appropriate Standard of Review

Compelled to independently examine the whole record,[94] the Ninth Circuit contemplated the degree to which *New York Times* required it to "depart from the special deference with which [it] would normally treat each and every one of the jury's factual determinations."[95] Of particular concern was the distinction between the *New York Times* standard and Federal Rule of Civil Procedure 52(a), which provides that "[f]indings of fact . . . shall not be set aside unless *clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility

88. *Newton*, 677 F. Supp. at 1069.

89. *Newton*, 1990 U.S. App. LEXIS 15265 at 10.

90. *See id.* at 11 n.5:

> NBC questions whether liability for defamation based on a false impression, as opposed to a false statement, may be imposed without contravening the First Amendment . . . whether the district court impermissibly allowed the jury to determine which statements in the broadcasts were ones of fact and not opinion. . . . [Finally, NBC] challenges the district court's denial of its motion for a change of venue . . . including an attack on the law of [the] circuit regarding punitive damages in a First Amendment case.

91. *Id.* at 11.

92. *See id.* at 11 n.6 ("The district court held Newton to be a public figure and imposed sanctions of $55,000 on Newton for requiring his public figure status to be proved.").

93. *Id.* at 11. *See also New York Times*, 376 U.S. at 279-80.

94. *See New York Times*, 376 U.S. at 285 (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)). *See also supra* text accompanying note 24.

95. *Newton*, 1990 U.S. App. LEXIS 15265 at 14.

of witnesses."[96] Indeed, as the court noted, "the independent review standard and the clearly erroneous standard of Rule 52(a) 'point in opposite directions.' "[97]

Nevertheless, the court acknowledged that *New York Times* clearly mandated that in public figure defamation cases, an appellate court *must* independently review the entire record to reassure itself that the lower court's judgment did not manifest an intrusion on the field of free expression.[98] Moreover, the court found that "[t]he requirement of independent appellate review . . . is a rule of federal constitutional law which 'reflects' a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution."[99] Consequently, the court ruled that whether the evidentiary record clearly and convincingly establishes the actual malice elements required to strip the utterance of first amendment protection is not merely a question for the trier of fact.[100] As a result, the appellate court must take pains to secure the appropriate appellate protection of first amendment values[101] while simultaneously deferring to the findings of the trier of fact.[102] By finding that *New York Times'* rule of independent review assigns judges a constitutional duty which cannot be delegated to the trier of fact,[103] the Ninth Circuit could accept all factual findings of the district court and still rule as a matter of law that the record did not contain the clear and convincing evidence necessary to justify the lower court's ruling.[104]

Despite the requirement of Rule 52(a) to defer to the jury's or trial court's factual findings, the appellate court recognized that "the presumption of correctness that attaches to factual findings is stronger in some cases than in others."[105] Accordingly, the court reasoned that jury findings merit their greatest consideration when an appeal involves credibility determinations because only the factfinder has the opportunity to observe the witness.[106] Nevertheless, the fragility of the first amendment issues arising in *Newton* compelled the Ninth Circuit to be more discrimi-

96. FED. R. CIV. P. 52(a) (emphasis added). *See also Newton*, 1990 U.S. App. LEXIS 15265 at 14.

97. *Newton*, 1990 U.S. App. LEXIS 15265 at 14 (quoting *Bose*, 466 U.S. at 498).

98. *Newton*, 1990 U.S. App. LEXIS 15265 at 15 (citing *New York Times*, 376 U.S. at 285).

99. *Id.* (quoting *Bose*, 466 U.S. at 510-511).

100. *Id.* at 15-16.

101. *Id.* at 16.

102. *Id.*

103. *Newton*, 1990 U.S. App. LEXIS 15265 at 17.

104. *Id.* at 17-18.

105. *Id.* at 18 (quoting *Bose*, 466 U.S. at 500).

106. *Id.* (citing *Harte-Hanks*, 109 S. Ct. at 2696 (quoting *Bose*, 466 U.S. at 499-500)).

nating in deferring to the findings of the trial court.[107] Consequently, the court of appeals independently examined the entire factual record to assure that the dispositive constitutional problems in *Newton* were properly decided.[108]

As to the limits which the clearly erroneous directive of Rule 52(a) places on the appellate court's independent review of jury credibility determinations, the Ninth Circuit reasoned that the fundamental first amendment values at issue in public figure defamation cases "mandated heightened appellate review of actual malice determinations."[109] In particular, the court considered the need to defend first amendment virtues from the prejudices of a local jury against strangers: "Newton's case poses the danger that first amendment values will be subverted by a local jury biased in favor of a prominent local public figure against an alien speaker who criticizes that local hero."[110] Although the risk of unchecked favoritism of local juries usually factors into a decision about venue rather than standard of review, the extent to which Newton is revered in Las Vegas[111] forced the Ninth Circuit to be especially protective of the first amendment's fundamental liberties in its analysis on the merits.[112]

B. Applying the New York Times *Standard*

Overall, the Ninth Circuit found the facts of the case to be undisputed. The majority of evidence provided by the trial record concerned the federal investigation into Newton's possible connection to the Mafia.[113] For the purposes of its review, the court of appeals arranged the evidence into three categories: Newton's involvement with the Mafia, Newton's testimony before Nevada state gaming authorities, and the federal investigation of the Gambino family's efforts to enter the Las Vegas casino business.[114]

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107. *Newton*, 1990 U.S. App. LEXIS 15265 at 18.

108. *Newton*, 1990 U.S. App. LEXIS 15265 at 19 (quoting Pennekamp v. Florida, 328 U.S. 331, 335 (1946)). *See also Harte-Hanks*, 109 S. Ct. at 2695.

109. *Newton*, 1990 U.S. App. LEXIS 15265 at 20.

110. *Id.* at 20-21.

111. Las Vegas citizens celebrate Wayne Newton Day and have named a major boulevard in his honor. In addition, Newton was named "Distinguished Citizen of the Year" in 1980 by the Clark County Chapter of the National Conference of Christians and Jews, and at a Lincoln Day dinner in his honor in 1981, Newton was named the "Republican Man of the Year" in the state of Nevada. *Id.* at 21 n.15 and accompanying text.

112. *Newton*, 1990 U.S. App. LEXIS 15265 at 22.

113. *Id.* at 25.

114. *Id.* This Casenote will not address the third category ("the federal investigation of the Gambino family's efforts to enter the Las Vegas casino business").

1. The Evidentiary Record

a. Newton's Involvement With the Mafia

At trial, Newton's own testimony admitted that he and Penosi maintained a friendly relationship. Newton had dined at Penosi's house and even invited Penosi to his brother's wedding.[115] Newton had arranged for Penosi to visit his Las Vegas home on at least one occasion, and he even performed on a television special without payment as a favor for Penosi's son.[116] Of primary importance was the contact between the two in 1980 when Newton, who was receiving death threats from members of an organized crime syndicate, asked Penosi for help. Penosi responded by giving Newton the Connecticut phone number of Frank Piccolo, his mob boss.[117] FBI tapes recording phone conversations between Piccolo and Penosi establish that Piccolo convinced the Genovese family, which had been threatening Newton,[118] to cease the threats.[119]

The FBI tapes also establish that when Newton's friend and business advisor, Mark Moreno, became the recipient of threats, he sought help from Newton, who in turn introduced Moreno to Penosi.[120] Penosi had Newton call Piccolo personally and tell him that Moreno was "with" Newton as part of his team.[121] As a result, Piccolo again met with the Genoveses, who agreed to withdraw the threats in exchange for $3,500.[122]

Piccolo then sought to gain from his efforts in resolving Newton's problems.[123] The FBI's tapes of phone conversations between Penosi and Piccolo contain references to the mob's desire to "earn" from Newton, including Piccolo's specific interest in the Aladdin.[124] One example in the record shows that Piccolo introduced Moreno to an insurance agent and persuaded Moreno to buy a life insurance policy from him for Newton's friend, Lola Falana, a Las Vegas entertainer managed by Moreno.[125] About this time,[126] NBC journalists Brian Ross and Ira

115. *Id.*
116. *Id.*
117. *Newton,* 1990 U.S. App. LEXIS 15265 at 26.
118. The circumstances which prompted the Genovese family to threaten Newton were irrelevant to alleged actual malice of NBC and will not be discussed in this Casenote.
119. *Newton,* 1990 U.S. App. LEXIS 15265 at 26.
120. *Id.* at 27-28.
121. *Id.* at 28 n.22 and accompanying text.
122. *Id.* at 28.
123. *Id.* at 29 n.23 and accompanying text.
124. *Newton,* 1990 U.S. App. LEXIS 15265 at 29 n.23 and accompanying text.
125. *Id.* at 29.
126. July 1980. *Id.* at 29.

Silverman learned of the FBI's phone taps and other investigations into the possible correlation between Newton's desired purchase of the Aladdin and his communications to high-level Mafia figures.[127] As a result of their discovery, the journalists decided to inquire further.[128]

b. Newton's Testimony Before Nevada State Gaming Authorities

Nevada law requires approval both from the state Gaming Board and the state Gaming Commission to grant a license to own and operate a casino.[129] Consequently, during the summer months of 1980, Nevada gaming authorities began a routine investigation of Newton in response to his application to own and operate the Aladdin.[130] On numerous occasions in July and August 1980, Newton gave sworn testimony in interviews with a group of Nevada Gaming Board investigators led by Fred Balmer.[131] The tape of the August 27, 1980 interview was admitted into evidence in the trial.[132] The tape shows Balmer telling Newton of Penosi's criminal involvement.[133] In reply to specific questions about his relationship with Penosi, Newton said that he had first met Penosi in the early 1960s and that the two had had some contact over the past six months after Newton had received threatening phone calls.[134] Later in the interview, the investigators informed Newton that after his recent phone contact with Penosi, Penosi "made contact with an individual who is from back East in the New England States . . . Piccolo, who is heavily involved with organized crime," and that Penosi went "to the Las Vegas area and our information is he did take care of these individuals [who had made the threats] for you."[135] Newton's response — "Well, if it did happen, ah, I don't know who that is and I'm still getting threats as of last week"[136] — clearly contradicted Newton's trial testimony, which stated that the threats had ended.[137] The Gaming Board, however, even at the conclusion of its interview with Newton, remained unaware of

127. *Id.* at 29-30.
128. *Id.* at 30.
129. *Newton,* 1990 U.S. App. LEXIS 15265 at 40.
130. *Id.* at 30.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Newton,* 1990 U.S. App. LEXIS 15265 at 31.
135. *Id.* at 32.
136. *Id.*
137. *Id.* at 32 n.26. Part of Newton's response at trial to questions asking why he had not told Balmer that he had spoken with any individual at Penosi's request was as follows:

Q. When Mr. Balmer said to you, Mr. Newton, that after you did contact Mr. Penosi he made contact with an individual who was back east in the New England

Penosi visiting Newton's house, of any meetings between Penosi and Newton after the cessation of threats against Newton, and of Newton speaking with Piccolo or anyone else at Penosi's request in an attempt to stop the threats.[138]

Meanwhile, NBC journalists Ross and Silverman continued to acquire their own information, and their findings led to an important conflict in the trial testimony. Ross testified that he had learned from a knowledgeable, confidential source[139] that the New York Police Department ("NYPD") had discovered that Piccolo declined an offer to join some associates in Atlantic City mob rackets because he had resolved a problem for Wayne Newton and was going to receive some sort of interest in the Aladdin Hotel.[140] Newton, however, offered the testimony of

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states, did you tell him that, in fact, you had called someone in the New England states -

A. No, sir, I didn't.

Q. - at the request of Mr. Penosi?

A. No, sir, I didn't. I didn't know where I called.

Q. You dialed an area code, Mr. Newton?

A. Yes, sir.

Q. You had no idea what part of the country the area code was in?

A. No sir.

Q. And when Mr. Balmer said to you, Mr. Penosi made contact with an individual who was from back east in the New England states, "Piccolo" he called him, who was heavily involved with organized crime, why didn't you tell him that you had made two calls at Mr. Penosi's explicit request to someone else to help solve your problem?

A. It didn't occur to me. . . .

Id.

138. *Newton*, 1990 U.S. App. LEXIS 15265 at 33.

139. *Id.* at 33 n.27. In his testimony Ross attested to the source's reliability on two counts: (1) both he and Silverman had worked with this source before and since, and the source had proven to be very knowledgeable; and (2) other information that NBC received tended to confirm what it was being told by the source. When asked why the corroboration mattered, Ross stated that "It matters because nothing stuck out as a red flag, nothing suggested that [the source's information] was wrong." *Id.*

140. *Id.* In his deposition of September 3, 1982, Ross stated that:

for more than a year the FBI had been investigating Frank Piccolo with other members of the Gambino Mafia family. On at least one occasion Mr. Piccolo was overheard to be in a conversation with other mobsters in which he was asked whether he would be interested in Atlantic City in supposed mob rackets down there.

He said, no, he was involved with Wayne Newton in Las Vegas and he was going to be in the Aladdin, unquote.

When read the preceding deposition transcript at trial, Ross testified as follows:

Q. Did you so testify?

A. Yes, I did.

Q. And was the testimony truthful?

A. Yes it was. . . .

Q. Were you certain in your mind, *when the broadcast was broadcast on October 6, 1980,* that you had been told by a reliable source that Frank Piccolo had told associates that he had taken care of Newton's problem and had become a partner in the Aladdin Hotel deal?

A. I was certain of that. No doubt in my mind.

two NYPD officers who claimed that according to department records, the NYPD had not acquired any such knowledge.[141] Yet cross-examination of one of the officers established that in spite of department rules which prohibit members from supplying reporters with restricted material, NBC's journalists conceivably did obtain some information from the NYPD.[142] Moreover, the second officer testified that he assumed that NYPD members leak information to the press without department permission.[143]

Silverman testified that he had a confidential source inside the federal government, who told him that Piccolo and Penosi considered Newton to be a "mob asset" in Las Vegas.[144] In addition, "Source B," as Silverman called him, claimed that Piccolo and Penosi were trying to profit from their relationship with Newton.[145] Silverman further testified that Source B told him that Newton had not told Nevada gaming authorities the entire story surrounding his relationship with Penosi.[146]

On September 25, 1980, Ross and Silverman attended a Nevada Gaming Board public hearing on Newton's application for a license to purchase the Aladdin. Again under oath, Newton acknowledged meeting Penosi while in his teens but testified falsely that Penosi had never visited his home in Las Vegas,[147] adding that "[i]n the approximately 21 years from the time I met him, I might have seen this man four times

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Id. at 33 n.27 (emphasis added).

141. *Newton*, 1990 U.S. App. LEXIS 15265 at 34 n.28 and accompanying text.

142. *Id.*

143. *Id.*

144. *Id.* at 36.

145. *Id.*

146. *Newton*, 1990 U.S. App. LEXIS 15265 at 36 n.29 and accompanying text.

147. *Id.* at 37 n.30 and accompanying text. Asked by a Gaming Board member if Penosi had "ever visited you in your home," Newton replied, "No, sir." *Id.* At trial Newton explained this false testimony as follows:

> Q. Mr. Newton, that was not true, was it?
>
> A. No, sir, not in the context in which you are stating it. It was true in the context in which I interpreted the question.
>
> Q. Mr. Penosi had come to your house, had he not?
>
> A. I sent a car for him, yes, sir.
>
> Q. Mr. Penosi talked with you at your home?
>
> A. I assume we talked, yes, sir.
>
> Q. He stayed at your home for 20, 25, 30 minutes, I think you said?
>
> A. Approximately 15, 30 minutes, somewhere in there.
>
> Q. He went away from your home in the car that you had provided him.
>
> A. I didn't provide him a car. I provided him a ride. I believe I had someone pick him up and take him back.
>
> Q. You believe you told the whole story when you responded to the question has he ever visited you in your home and you said no, sir?
>
> A. In the context in which I understood the question, yes, sir.

Id.

. . . ."[148]

Newton also testified falsely before the Gaming Board about his relationship with his manager, Mark Moreno. He claimed that Moreno was only a friend, and in reply to a question whether Moreno was "a representative of [his] in any way, shape or form," Newton answered that the two had "[n]o association whatsoever."[149] The falsity of Newton's testimony before the Gaming Board became apparent when Moreno testified at trial that among other things, he had organized business meetings for Newton regarding the purchase of the Aladdin, searched for possible business partners for Newton, and wrote the contract which would enable Newton to become the Aladdin's executive director of entertainment.[150]

The Gaming Board, of course, only knew what it elicited from Newton at its interviews and at the hearing. Upon learning that the Valley Bank of Nevada was providing Newton with financing which would enable him to buy a fifty percent interest in the Aladdin while committing him to perform there at least 20 to 26 weeks a year, the Board adjourned the hearing by recommending that Newton be licensed.[151]

Immediately following the hearing, Ross attempted to interview Newton. In his answer to a Ross question, Newton falsely stated that he had last spoken with Penosi "maybe a year ago" and that Penosi had not called him.[152] Ross pursued Newton from the building where the Gaming Board had convened to Newton's car in the parking lot.[153] When he asked Newton whether Penosi went to Las Vegas to provide protection for Newton during the death-threat episode, Frank Fahrenkopf, Newton's attorney at the time, only said "[c]ome on, that's silly."[154]

On September 26, 1980, the day after the Gaming Board had recommended that Newton be licensed, Nevada's Gaming Commission held a hearing, approved the Board's recommendation, and granted Newton his

148. *Id.* at 37.

149. *Id.* at 38 (quoting from the transcript of the public hearing before the Nevada Gaming Board, Sept. 25, 1980. Newton explained at trial that he understood the question from the Gaming board asking him if Moreno was a "representative of [his] in any way, shape or form" to ask instead if he had a "contractual arrangement" with Moreno. *Id.* at 38 n.31.

150. *Newton,* 1990 U.S. App. LEXIS 15265 at 38 n.32 and accompanying text.

151. *Id.* at 39.

152. *Id.* at 39 n.33 and accompanying text. At trial, Newton testified about his response to Ross regarding when he had last spoken with Penosi as follows:

> Q. Was that true, Mr. Newton?
>
> A. No, it wasn't. But I didn't realize I was under oath to Mr. Wimp [Brian Ross] over there.

Id. at 39 n.33.

153. *Newton,* 1990 U.S. App. LEXIS 15265 at 39.

154. *Id.*

license to own and operate the Aladdin.[155] At the hearing, Newton submitted an affidavit to supplement his testimony before the Gaming Board concerning Penosi.[156] In the affidavit, Newton declared that he had seen Penosi only once in the past 13 years — when Penosi had visited Las Vegas — but conceded that he had appeared on a television program produced by Penosi's son.[157] Significantly, the affidavit failed to disclose Penosi's visit to Newton's home as well as the calls to and conversations with Penosi during the death-threat episode.[158]

In preparing for the October 6 broadcast, Ross and Silverman interviewed some additional sources. On September 26, 1980, the same day that the Gaming Commission licensed Newton to purchase the Aladdin, the journalists met with Johnny Carson, a Los Angeles talk-show host whose earlier bid for the Aladdin had been unsuccessful.[159] In questioning Carson about his negotiations for the Aladdin, the reporters mentioned Penosi's name, but Carson maintained that he had never heard of Penosi and could not provide any information about him.[160] Ross and Silverman also talked to Mark Moreno about Moreno's and Newton's possible ties with Penosi and Piccolo.[161] Moreno testified, and Ross agreed, that Moreno told Ross that the contacts between Penosi and Newton had nothing to do with the Aladdin, but concerned death threats against Newton and his family.[162] Silverman added that Moreno blamed local Las Vegas hoods for the death threats against Newton.[163] Moreno also testified that he told the newsmen that Penosi's involvement in halting the threats against Newton would be disclosed in an affidavit being prepared by Fahrenkopf.[164] The affidavit, as previously discussed,[165] did not mention any threats.[166]

The journalists also wanted to interview Newton, yet the testimony differs as the strength of their efforts to schedule the interview prior to the October 6 broadcast. Ross and Silverman contend that they continually sought and were denied permission to interview Newton.[167]

155. *Id.* at 40.
156. *Id.*
157. *Id.*
158. *Newton,* 1990 U.S. App. LEXIS 15265 at 40.
159. *Id.* at 40-41.
160. *Id.* at 41 n.34 and accompanying text.
161. *Id.* at 42.
162. *Id.*
163. *Newton,* 1990 U.S. App. LEXIS 15265 at 42.
164. *Id.*
165. *See supra* notes 156-158 and accompanying text.
166. *Newton,* 1990 U.S. App. LEXIS 15265 at 42.
167. *Id.* at 43.

Newton, however, testified that he was unaware of NBC's desire to interview him about Penosi.[168] Nevertheless, Ross and Silverman clearly made some attempts to interview Newton and that Newton rejected them at least once.[169] The testimony of Newton and his secretary, Mona Matoba, for instance, show that when Silverman called to request an interview, Newton directed Matoba to ascertain what kind of story they wanted to do.[170] When Matoba said that the journalist wanted to ask Newton about the Aladdin and Guido Penosi,[171] Newton told her to decline the interview.[172] In addition, the journalists asked Ramon Hervey, a public relations executive who knew Moreno, to help them arrange an interview with Newton.[173] Hervey testified that Silverman told him that Newton was a "hard guy to get to and [that] I really would like to talk to him, just for a few minutes."[174] Moreover, Hervey asserted that Silverman was persistent in trying to enlist his assistance in getting an interview with Newton.[175]

The Ninth Circuit ultimately found that the majority of the facts reported by NBC in the October 6, 1980 broadcast were uncontroverted.[176] Newton had gone to Penosi with a problem. Penosi, who was being investigated by federal authorities for his involvement in mob rackets, called Piccolo, a reputed mob boss, who helped solve the problem. Piccolo and Penosi later discussed "earning off" Newton, and there is evidence to suggest their interest in profiting from Newton's ownership in the Aladdin Hotel and Casino.

2. Examining the Error of the District Court Analysis

The district court upheld the jury's liability verdict because of the "clear and inescapable impression" that since Newton lacked the money to buy the Aladdin Hotel, he called Penosi, a friend who had ties to organized crime, and that in exchange for helping Newton raise the money, Penosi acquired a hidden interest in the Aladdin Hotel.[177] The district court judged that this impression was conveyed with actual malice and advanced two arguments in support of its ruling. First, the court

168. *Id.*
169. *Id.*
170. *Id.*
171. *Newton*, 1990 U.S. App. LEXIS 15265 at 43.
172. *Id.*
173. *Id.*
174. *Id.* at 43 n.36.
175. *Id.*
176. *Newton*, 1990 U.S. App. LEXIS 15265 at 44.
177. *See Newton*, 677 F. Supp. at 1067.

reasoned that NBC "should have . . . foreseen" that the broadcast would leave the impression that the mob had financed Newton's purchase of the Aladdin, regardless of whether NBC had intended to leave that impression.[178] The district court added that NBC's failure to anticipate this possible impression of the broadcast revealed a reckless disregard for the truth.[179] Second, the lower court concluded that NBC had edited and combined the audio and visual portions of the broadcast in a way that created the defamatory impressions.[180] Since those impressions were "clear and inescapable," the district court found that the jury could properly discredit and reject the testimony of the NBC journalists that they had not intended to leave a false impression.[181] Both of these rulings contradict the principles espoused in *New York Times* and *Bose.*

According to the Ninth Circuit, the district court misconstrued the law in holding that "an interpretation of the broadcast that *should have been foreseen* by the journalists [could] give rise to liability."[182] The district court's gauge of what should have been foreseen is an objective negligence test, and differs significantly from the deliberately subjective actual malice test of *New York Times.*[183] The impact of this distinction is that negligence, based upon an objective standard like the one used by the district court, can never engender liability in a public figure defamation case. Indeed, the United States Supreme Court has held that a reckless disregard for the truth "requires *more than a departure from reasonably prudent conduct.*"[184] Consequently, the district court erred in grounding liability on an objective standard.

In addition, the district court incorrectly held that the jury could have based a finding of actual malice upon its determination that the journalists' testimony about their state of mind was not credible.[185] The Supreme Court has ruled that "when the testimony of a witness is not believed, the trier of fact may simply disregard it."[186] Nonetheless, the Court added that discredited testimony alone does not provide sufficient grounds for drawing a contrary conclusion.[187] Furthermore, the

178. *Newton,* 1990 U.S. App. LEXIS 15265 at 47. *See also Newton,* 677 F. Supp. at 1068.

179. *Id.*

180. *Newton,* 1990 U.S. App. LEXIS 15265 at 47. *See also Newton,* 677 F. Supp. at 1067-68.

181. *Id.*

182. *Newton,* 1990 U.S. App. LEXIS 15265 at 47 (emphasis added).

183. *Id.* at 47-48. *See generally Harte-Hanks,* 109 S. Ct. at 2696.

184. *Harte-Hanks,* 109 S. Ct. at 2696 (emphasis added). *See generally supra* text accompanying notes 17-22.

185. *Newton,* 1990 U.S. App. LEXIS 15265 at 48.

186. *Id.*

187. *Bose,* 466 U.S. at 512. *See also* Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir.

Supreme Court affirmed the reversal of the district court in *Bose*,[188] which had found that the author of a magazine article about stereo systems had lied in testifying that the words he had used in the article meant something other than what the court interpreted them to mean.[189] The district court in *Bose* had "reasoned that since [the author of the article] did know what he had heard, and he knew that the meaning of the language employed did not accurately reflect what he heard, he must have realized the statement was inaccurate at the time he wrote it."[190] The district court's understanding of the author's language, however, was only

> "one of a number of possible rational interpretations" . . . [and] [t]he choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the first amendment's broad protective umbrella. Under the District Court's analysis, any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time.[191]

As *Bose* illustrated and as *Harte-Hanks* reaffirmed,[192] actual malice does not result from a finding that an "intelligent speaker"[193] failed to depict the words he used as the finder of fact did.[194] Accordingly, no court could have properly upheld the jury's verdict in *Newton* because the verdict was based on a legally unsupportable inference. The jury found that since the NBC journalists were trained professionals, and since the broadcast was capable of painting a libelous portrayal of Newton, NBC therefore must have intended to impart the defamatory impression Newton claims.[195] Nevertheless, the district court in *Newton* tried to justify its ruling upon that same basis: since the court found the impression from the broadcast to be "clear and inescapable," it held that the jury correctly found that NBC *intended* to pass on that

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1952), which held that a plaintiff could not meet his burden of proving that a defamatory statement had been made by showing that the jury disbelieved those who denied making it. *Newton*, 1990 U.S. App. LEXIS 15265 at 48 n.39.

188. 466 U.S. 485 (1984).

189. *Newton*, 1990 U.S. App. LEXIS 15265 at 49.

190. *Id.* at 50 (quoting *Bose*, 466 U.S. at 512). *See also supra* text accompanying notes 38-43.

191. *Newton*, 1990 U.S. App. LEXIS 15265 at 50-51 (quoting *Bose*, 466 U.S. at 512-13 (quoting Time, Inc. v. Pape, 401 U.S. 279, 290 (1971))).

192. *See Harte-Hanks*, 109 S. Ct. at 2696 n.35.

193. *Bose*, 466 U.S. at 511.

194. *Newton*, 1990 U.S. App. LEXIS 15265 at 51.

195. *Id.*

impression.[196]

The Ninth Circuit asserted that the lower court's "approach eviscerates the first amendment protections established by *New York Times.* It would permit liability to be imposed not only for what was not said but also for what was not intended to be said."[197] Thus, the court of appeals held that the district court erred by substituting the jury's opinion of the broadcast's impression for that of the journalists who prepared the broadcast.[198] This substitution impermissibly gave the jury an expanded role.[199]

3. The Independent Review of the Ninth Circuit Court of Appeals

As compelled by *New York Times,* the Ninth Circuit concluded its review by examining the evidentiary record and conducting its own analysis to determine if it provided a clear and convincing basis for the jury's finding of actual malice. Newton brought forth the following six basic arguments in an attempt to expose NBC's actual malice, yet in each instance, the court of appeals dismissed Newton's assertion for failing to sustain the level of proof *New York Times* requires. Ultimately, the Ninth Circuit's assessment of the testimony and of the circumstantial and documentary evidence failed to reveal evidence of actual malice, much less clear and convincing proof of the same. As a result, the appellate court reversed the lower court's ruling against NBC and dismissed the complaint.

a. Failure to Mention the Death Threats

Newton observed that the October 6, 1980 broadcast failed to mention that Newton's calls to Penosi and Piccolo came about because of the death threats he had been receiving, and he argued that this absence evinces actual malice.[200] Newton reasoned that in explaining his contact with Penosi, the death threats provide an alternative to any financial trouble he may have experienced in acquiring the Aladdin.[201] NBC, on the other hand, contended that Newton's argument was irrelevant because the broadcast would have been no less defamatory if NBC had explicitly declared that Newton gave the Mafia an interest in the Aladdin in exchange for ending the death threats. The defamatory impact of the

196. *Id.* at 51-52.
197. *Id.* at 52.
198. *Id.*
199. *Newton,* 1990 U.S. App. LEXIS 15265 at 52.
200. *Id.*
201. *Id.*

fact that Newton received help from mobsters who were planning to "earn off" his ownership in the Aladdin would remain the same regardless of the details about the nature of the help the Mafia provided.[202]

The Ninth Circuit averred that although NBC correctly maintained that the Mafia had done Newton a favor, NBC's argument was inconsequential, the circumstances which induced the mob's intervention notwithstanding.[203] In assessing the question of actual malice, the fundamental inquiry is the journalist's state of mind and whether he "realized that his statement was false or that he subjectively entertained serious doubt as to the truth of the statement."[204]

The NBC journalists testified that they lacked enough credible evidence to broadcast on October 6 that threats had been made.[205] NBC's primary source of the information that the "problem" the Mafia had solved for Newton involved threats against his life was Moreno, whose story the journalists found questionable.[206] Newton claimed that the reporters knew he called the mob with a "security problem," not a financial one, based on his belief that NBC should have deemed Moreno a credible witness.[207] More specifically, Newton insisted that since the journalists testified that they found Moreno an unreliable source, the jury *had* to conclude that the journalists were lying.[208]

The Ninth Circuit described Newton's argument as "convoluted,"[209] and explained that *New York Times* shields journalists from liability for factual mistakes resulting from the journalists' reliance upon a credible source.[210] As the Supreme Court held in *St. Amant,*[211] as long as a journalist has made some effort to verify his or her information, the journalist will not be guilty of actual malice, even when the journalist used a source with unknown reliability.[212] *St. Amant* suggested that "reckless disregard for truth could be predicated on reliance 'wholly on an unverified anonymous telephone call,' but found that when the publisher had not deemed the source to be 'unsatisfactory,' and had verified

202. *Id.* at 52-53.

203. *Id.* at 53.

204. *Newton,* 1990 U.S. App. LEXIS 15265 at 53 (quoting *Bose,* 466 U.S. at 511 n.30).

205. *Id.* at 53-54. NBC said it did have sufficient credible evidence to mention the threats in subsequent broadcasts. *Id.*

206. *Id.* at 54.

207. *Id.*

208. *Newton,* 1990 U.S. App. LEXIS 15265 at 54.

209. *Id.*

210. *Id.* at 55.

211. 390 U.S. 727 (1968).

212. *Newton,* 1990 U.S. App. LEXIS 15265 at 55.

aspects of the information, there was no reckless disregard."[213]

Moreover, the court observed that a journalist's evaluation of a source intrinsically involves essential free speech values.[214] Consequently, the court determined that the utility in safeguarding a journalist's ability to gather material through various methods mandates the application of a more scrutinizing first amendment standard of review.[215] The court noted that the reliability of a source relates directly to the conditions under which a journalist writes a story.[216] Accordingly, the court ruled that the import in allowing reporters "to interview diverse sources, pursue multiple story lines, and draw their honest and professional conclusions from their research dictates that the media should not fear that its journalists' professional judgments will be second-guessed by juries without the benefit of careful appellate review."[217]

The Ninth Circuit concluded that the uncontroverted evidence established that the NBC journalists were not reckless in rejecting as incredible Moreno's details about the threats.[218] The journalists testified that they were uneasy about Moreno based on their understanding of Moreno's possible connection to the Mafia.[219] They further doubted Moreno's credibility because of his claimed involvement with Newton's purchase of the Aladdin, especially after Newton himself denied any association with Moreno.[220] In addition, Moreno's reliability suffered when his statement to the journalists that Newton's affidavit would clarify the extent of Newton's relationship with Penosi failed to include such information.[221] Lastly, while accompanying Newton after the Gaming Board hearing,[222] Fahrenkopf, who possessed a spotless reputation in the community as well as with NBC, expressly refuted that Penosi had pro-

213. *Id.* (quoting *St. Amant,* 390 U.S. at 732-33).

214. *Id.* at 55-56. *See also* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1557 (9th Cir. 1989) (Kozinski, J., dissenting).

215. *Newton,* 1990 U.S. App. LEXIS 15265 at 56-57.

216. *Id.* at 56.

217. *Id.* at 56-57.

218. *Id.* at 58.

219. *Id.*

220. *Newton,* 1990 U.S. App. LEXIS 15265 at 58-59. The court points out that although this response by Newton was false, it does not mean that the journalists had reason to believe that Moreno, rather than Newton, was lying. "The actual malice inquiry looks at circumstantial evidence of what the journalists *knew* rather than at circumstantial evidence of what turned out to be correct." *Id.* at 59 n.41 (emphasis added). *See also supra* note 149 and accompanying text.

221. *Newton,* 1990 U.S. App. LEXIS 15265 at 59. *See also supra* text accompanying notes 156-158.

222. *Newton,* 1990 U.S. App. LEXIS 15265 at 59.

tected Newton from threats.[223]

Irrespective of whether the jury believed the journalists about their states of mind as to the possibility of alluding to the threats in the October 6 broadcast, the apparent inconsistencies between Moreno's information and the information gleaned from Newton and his agents negated a finding of reckless disregard for the truth.[224] Newton could not blame the journalists for believing his own statements, and as the court noted, " 'it would be ironical [sic] and certainly inequitable for [Newton] to profit . . . from his own misstatements.' "[225] As a result, the court held that NBC's failure to mention the threats in the October 6 broadcast did not manifest clear and convincing evidence of actual malice.

b. Reference to Newton's Financial Problems

Newton claimed that the statement on the October 6 broadcast that "[d]espite his big income, authorities say Newton has had financial problems" indicated that NBC sought to strengthen the idea that the Mafia had a hidden share in the Aladdin and thereby intentionally tried to defame Newton.[226] Newton discovered that an early sketch of the broadcast referred to his financial problems as "serious," and he alleged that use of this term displayed that NBC wanted to exaggerate his financial status to bolster the notion that he had contacted the mob for financial assistance in his purchase of the Aladdin.[227] Newton further submitted that NBC's omission of the word "serious" from the show's transcript demonstrated clear and convincing proof of actual malice.[228]

The court disposed of this argument for various reasons. First, the statement was true: authorities had said that Newton had financial problems, and thus, the court could not support a finding of actual malice.[229] The testimony of Nevada Gaming Board member Glen Mauldin attested that the Board was in fact distressed about Newton's financial health, particularly his ability to purchase and operate the Aladdin.[230] The Board's investigation revealed that prior to buying the Aladdin, Newton was averaging a $75,000 delinquency in his monthly obligations, and that acquiring the Aladdin would increase his monthly responsibili-

223. *Id. See also supra* text accompanying note 154.

224. *Newton,* 1990 U.S. App. LEXIS 15265 at 59.

225. *Id.* (quoting Friedman v. Boston Broadcasters, Inc., 13 Media L. Rep. (BNA) 1742, 1744 (Mass. Super. Ct. 1986), *rev'd on other grounds,* 402 Mass. 376, 522 N.E.2d 959 (1988)).

226. *Newton,* 1990 U.S. App. LEXIS 15265 at 60 n.42 and accompanying text.

227. *Id.* at 60-61.

228. *Id.* at 61.

229. *Id.*

230. *See id.* at 62 n.43 and accompanying text.

ties by $85,000.[231] Second, the evidence disclosed that the death threats against Newton were precipitated by Newton's dispute with a low-level mobster over an amount in the neighborhood of $20,000.[232] The court of appeals observed that $20,000 represents a significant amount of money and that a debt to a mobster which leads to death threats represents a "serious problem."[233] Finally, the court rejected Newton's allegation about the removal of the word "serious," explaining that "[e]diting to make a broadcast more understated and cautious cannot possibly be grounds for actual malice."[234]

c. *Existence of a Hidden Partner*

Newton contended that since Ross and Silverman had attended the September 25, 1980 hearing of the Gaming Board and heard testimony that Valley Bank of Nevada was providing Newton with the Aladdin financing, NBC's false statement that "Piccolo told associates that he . . . had become a hidden partner in the Aladdin"[235] evidenced actual malice.[236] In other words, the knowledge that Valley Bank was funding the Aladdin deal should have eliminated the possibility that Newton could have a hidden partner.

The court easily dismissed this contention with the testimony of Newton's own organized crime expert, Professor Robert Blakely, who bluntly stated that Valley Bank's providing money for Newton's Aladdin purchase "did not answer the question of whether any hidden interest existed."[237] Blakely testified that a hidden interest in a casino is not synonymous with actual ownership but represents an interest in the "skim" — the amount of casino receipts not reported to the appropriate authorities as receipts.[238] Neither corporate documents nor materials available for public review would reflect such an interest.[239] Consequently, even though the journalists knew about Valley Bank's financing, that information proved to be unhelpful in demonstrating that NBC exhibited actual malice in conveying that the Mafia had acquired a hidden interest in the Aladdin.[240]

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231. *Newton,* 1990 U.S. App. LEXIS 15265 at 61-62.
232. *Id.* at 63.
233. *Id.*
234. *Id.*
235. *Id. See supra* note 140 and accompanying text.
236. *Newton,* 1990 U.S. App. LEXIS 15265 at 64.
237. *Id.* at 64-65.
238. *Id.*
239. *Id.* at 65.
240. *Id.*

d. Ambiguous Wording and Editing

Newton complained that certain language choices and editing decisions manifested actual malice on the part of NBC. In one example, Newton charges that NBC should have included the words "if any" or "possible" in describing Penosi's role in the sentence "[a] federal grand jury is investigating the role of Guido Penosi and the mob in Newton's deal for the Aladdin."[241] The court had to reject this criticism on the foundation that complaints or disagreements over language choices are editorial decisions that do not precipitate liability.[242] Furthermore, "the first amendment cautions courts against intruding too closely into questions of editorial judgment, such as *choice of specific words.*"[243] At worst, the court said that the sentence at issue was "slightly ambiguous," adding that it "does not mislead listeners about the nature of the federal [investigation]."[244] Nonetheless, the court followed Ninth Circuit precedent which precludes liability in public figure defamation cases upon the use of ambiguous language.[245]

The court also rejected Newton's complaints about two other NBC editing decisions. First, it discarded Newton's problem with NBC's omission of the second part of Newton's response to the question posed to him at the Gaming Board hearing: "Are you planning to continue any relationship with Mr. Penosi?" The program contained the first part of Newton's answer — "Well, on the basis of which I've known him, I don't think there's been a relationship" — but not the second part, "The direct answer to your question is obviously no if he has those kind [sic] of connections."[246] The court also dismissed Newton's protest concerning the broadcast's depiction of his angry response to Ross's questions after the Gaming Board hearing.[247] Newton contended that the broadcast had failed to show the earlier segment of the attempted interview which, according to Newton, prompted his anger.[248] The court conceded that although the broadcast did not depict Newton in complimentary terms,[249] the challenged material represented a true illustration of

241. *Newton,* 1990 U.S. App. LEXIS 15265 at 65.

242. *Id.* at 65-66.

243. *Id.* at 66 (quoting Janklow v. Newsweek, Inc. 788 F.2d 1300, 1304 (8th Cir. 1986), *cert. denied,* 479 U.S. 883 (1986)).

244. *Id.* at 66 n.44 and accompanying text.

245. *Id.* at 66. *See also Masson,* 895 F.2d at 1544-45.

246. *Newton,* 1990 U.S. App. LEXIS 15265 at 67. *See id.* at 37 for a relevant excerpt of Newton's trial testimony.

247. *Newton,* 1990 U.S. App. LEXIS 15265 at 67. *See also supra* text accompanying notes 153-154.

248. *Newton,* 1990 U.S. App. LEXIS 15265 at 67.

249. *Id.*

Newton's demeanor during the Board's investigation and was therefore pertinent to NBC's report.[250]

e. NBC's Lack of Effort to Interview Newton

Newton also argued that the journalists did not make a sufficient attempt to interview him, and that the absence of a more spirited effort manifested that the journalists did not care to hear Newton's side of the story.[251] Although the Supreme Court has held that purposeful avoidance of the truth could evince actual malice,[252] the evidence showed that Ross and Silverman tried on at least two occasions to interview Newton and that Ross did actually interview him once.[253] Moreover, nothing in the record exhibited that the journalists *deliberately* tried to avoid the truth in preparation for the October 6 broadcast.[254]

f. Overall Impression of Television

Finally, Newton insisted that "television allows the media to interpose sound and pictures over words and to manipulate the impressions it creates."[255] Accordingly, Newton asserted that an average viewer, who watches a television broadcast once, does not have the opportunity to analyze each word with the precision necessary to understand its intended meaning.[256] Thus, a viewer can only infer the "overall impression" of a broadcast.[257] As a result, Newton maintained that the court should have avoided a word-by-word examination of the broadcast because the overall impression of television depends upon images, not words.[258]

In the first place, the court pointed out that Newton had earlier requested the "careful parsing" which he was now condemning.[259] Additionally, the court found Newton to have misunderstood that the purpose of appellate review in a first amendment case is to determine whether supposedly maligning speech falls within the sheltering penumbra of that amendment.[260] To have abided by Newton's recommendation would

250. *Id.*
251. *Id.* at 68.
252. *Id.* (quoting *Harte-Hanks,* 109 S. Ct. at 2698).
253. *Newton,* 1990 U.S. App. LEXIS 15265 at 68.
254. *Id.*
255. *Id.* at 68-69.
256. *Id.*
257. *Id.* at 69.
258. *Newton,* 1990 U.S. App. LEXIS 15265 at 69.
259. *Id.* at 69 n.45. *See also supra* text accompanying notes 226-228.
260. *Newton,* 1990 U.S. App. LEXIS 15265 at 69.

have required that the court relinquish its constitutional duty: analyzing a telecast with less scrutiny since one-time viewers can only perceive general images spurns the constitutional values defended by the rule of independent judicial review.[261]

V. CONCLUSION

The constitutional protection for the press embodied in the first amendment represents part 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."[262] In agreement with this commitment, the Supreme Court, in *New York Times,* precluded a public official from collecting damages for a defamatory statement about his official conduct unless he could prove that the statement was made with actual malice.[263] In doing so, the Court furnished the media with a valuable privilege by shielding journalists from liability for factual mistakes resulting from the journalists' reliance upon a credible source.[264] In *Curtis Publishing Co. v. Butts,*[265] the Court extended the privilege to protect defamatory criticism of *non*-official public figures whose fame and notoriety necessarily subjects them to public scrutiny.[266] Since Wayne Newton clearly fit the description of a public figure,[267] the Ninth Circuit Court of Appeals in *Newton* correctly applied the *New York Times* standard in reversing the decision of the District Court.

A. NBC's October 6 Broadcast

Upon discovering that the FBI was looking into the connection between Newton's desired purchase of the Aladdin and his telephone conversations with renowned mobsters, NBC's Ross and Silverman initiated

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261. *Id.* at 69-70.

262. *New York Times,* 376 U.S. at 270.

263. *New York Times,* 376 U.S. at 279-80.

264. *Newton,* 1990 U.S. App. LEXIS 15265 at 55. *See also Gertz,* 418 U.S. at 336-337 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 162, 164 (1967) (Warren, C.J., concurring)); *Harte-Hanks,* 109 S. Ct. at 2682, 2696; *St. Amant,* 390 U.S. at 731; and text accompanying *supra* note 51.

265. 388 U.S. 130 (1967). *See supra* text accompanying note 16.

266. Curtis Publishing Co. v. Butts, 388 U.S. 130, 162, 164 (1967) (Warren, C.J., concurring).

267. *Newton,* 1990 U.S. App. LEXIS 15265 at 11 n.6. *See also* text accompanying *supra* note 92.

their own investigation.[268] After a four month inquiry, the journalists aired their findings on October 6. Based on the information they had discovered, the journalists clearly lacked the actual malice necessary to subject them to liability.[269]

Ross learned from a trusted source that the New York Police Department had discovered that mob boss Piccolo was to get an interest in the Aladdin Hotel, apparently in exchange for having settled a problem for Newton.[270] Silverman ascertained from a source inside in the federal government that Piccolo and Penosi were attempting to profit from their relationship with "mob asset" Newton, who in turn had withheld from Nevada gaming authorities pertinent details about his relationship with Penosi.[271]

At the September 25 public hearing, the journalists heard Newton testify that he had seen Penosi only four times in the past twenty-one years.[272] In addition, while still under oath Newton denied having any business relationship with Moreno, stating that the two were merely friends.[273] After the hearing, when Ross asked Newton whether Penosi had gone to Las Vegas to protect Newton from death threats, Newton's attorney, Fahrenkopf, responded in Newton's presence, "[c]ome on, that's silly"[274] — a negative and flippant reply which essentially told Ross to dismiss the death-threat angle altogether. Finally, the journalists' interview with Moreno was discredited when the affidavit Newton submitted to the Nevada Gaming Commission on October 26 failed to disclose details about Penosi's involvement in stopping the threats against Newton.[275]

Not a single detail of the October 6 broadcast is unsupported by the preceding facts.[276] Ross and Silverman attempted to verify the information they acquired, and where verification of a fact was not possible, that fact was omitted from the story.[277] They did not broadcast anything

268. *See Newton,* 1990 U.S. App. LEXIS 15265 at 29-30 and *supra* text accompanying notes 126-128.

269. *See Newton,* 1990 U.S. App. LEXIS 15265 at 54, 68.

270. *See id.* at 33 n.27. *See also supra* notes 139-140 and accompanying text.

271. *See Newton,* 1990 U.S. App. LEXIS 15265 at 36 & n.29.

272. *See supra* text accompanying note 148.

273. *See supra* note 149 and accompanying text.

274. *Newton,* 1990 U.S. App. LEXIS 15265 at 39.

275. *Id.* at 40, 59.

276. *Id.* at 44.

277. *See id.* at 53-54, 58-60. *See also* Response of Defendants/Appellants to Petition for Rehearing and Suggestion for Rehearing En Banc at 2, *Newton,* 1990 U.S. App. LEXIS 15265 (Nos. 89-55220, 89-55285).

which they believed was false or probably false, and as a result, neither NBC nor the journalists were liable for defaming Wayne Newton.

B. The Appellate Court's Decision

Above all else, the Ninth Circuit's opinion in *Newton* indicates that the judiciary reveres the guarantees of the first amendment as the Constitution's most sacred promise. Despite the plain intent of Federal Rule of Civil Procedure 52(a) that jury findings shall not be set aside unless clearly erroneous,[278] the Ninth Circuit found that defamation cases pose a danger to first amendment protections which transcends the fact-finder's role.[279] In particular, the court ruled it necessary to shield first amendment values from the biased Las Vegas jury.[280] Newton was and still is so adored by Las Vegas denizens that the Ninth Circuit feared that the jury would ignore first amendment protections and unfairly disadvantage NBC.[281] In its independent review of the trial record, the Ninth Circuit uncovered evidence which justified its fears.

Not only did the court establish that NBC had broadcast its story without actual malice, but the court also suggested that because of Newton's evasive and manipulative testimony, he was not deserving of any jury award whatsoever. Throughout its opinion, the Ninth Circuit describes instances of perjurious conduct on the part of Newton. On at least two different occasions, Newton's trial testimony regarding his relationship with Penosi directly contradicts statements he made to the Nevada Gaming Board while under oath.[282] Furthermore, the testimony of Newton's secretary, Matoba,[283] that Newton declined to be interviewed about Penosi and the Aladdin is highly suggestive of bad faith.

Overall, the opinion highlights many instances where Newton clearly lied while under oath, and thus conveys that Newton may not be the innocent victim he claimed to be.[284] The opinion's frequent allusions to Newton's dishonesty suggest that beyond the legal reasons for reversing the lower court's decision, the Ninth Circuit could have reached a similar conclusion on principles of justice and equity.

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278. *See* FED. R. CIV. P. 52(a).

279. *See Newton*, 1990 U.S. App. LEXIS 15265 at 15-20 and text accompanying *supra* notes 98-109.

280. *See id.* 20-21 and text accompanying *supra* note 110.

281. *See id.* at 21-22 and text accompanying *supra* notes 111-12.

282. *See id.* at 32 & n.26 (description of Newton's false testimony concerning whether the death threats had ended) and *id.* at 37 & n.30 (account of Newton's false testimony as to whether Penosi had ever visited Newton at Newton's home).

283. *See Newton*, 1990 U.S. App. LEXIS 15265 at 43.

284. *See* Goldner, *supra* note 64, at 75.

VI. AFTERWORD

When the Ninth Circuit's decision came down on August 30, 1990, the opinion received the advance sheet citation of 913 F.2d 652. Yet before volume 913 of the Federal Reporter, Second Series, was published, appellee Newton filed a petition for rehearing on September 13.[285] On November 8, the Ninth Circuit ordered the appellants to respond to a specific portion of appellee's rehearing petition.[286] In addition, the court informed the West Publishing Company ("West") that the *Newton* opinion should be "held" while the petition for rehearing was being considered.[287] West subsequently withdrew the opinion from the Federal Reporter.[288] Nevertheless, the court did not formally withdraw the opinion and, as a result, the opinion still represents official case law.[289]

On December 12, 1990, Newton filed a reply to NBC's response,[290] and as of February 11, 1991, the parties involved in *Newton* are awaiting the court's ruling on this motion.[291]

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285. *See* Appellee's Petition for Rehearing and Suggestion of the Appropriateness of a Rehearing En Banc, *Newton,* 1990 U.S. App. LEXIS 15265, (Nos. 89-55220, 89-55285). The petition contains Newton's criticism of the Ninth Circuit's decision for misapplying the relevant law and for misconstruing significant evidence. *Id.*

286. *See* Order at 2, *Newton,* 1990 U.S. App. LEXIS 15265 (No. 89-55220). On November 21, 1990, NBC filed its response with the Ninth Circuit, maintaining that the appellate court had correctly refuted Newton's unsupported claims. *See* Response of Defendants/Appellants to Petition for Rehearing and Suggestion for Rehearing En Banc at 2, n., *Newton,* 1990 U.S. App. LEXIS 15265 (Nos. 89-55220, 89-55285).

287. Telephone interview with Bill Araiza, law clerk to *Newton* opinion author Judge William A. Norris, February 11, 1991.

288. *Id.*

289. *Id.*

290. *See* Appellee's Motion For Leave to File "Reply of Appellee in Support of Petition for Rehearing and Suggestion of the Appropriateness of a Rehearing En Banc," *Newton,* 1990 U.S. App. LEXIS 15265 (Nos. 89-55220, 89-55285). This motion contains Newton's objections to the arguments employed by NBC in its response to appellee's petition for rehearing and reiterates many of the claims from that petition. *Id.*

291. Telephone interview with Bill Araiza, law clerk to *Newton* opinion author Judge William A. Norris, February 11, 1991.

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