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Recent Developments: *Masson v. New Yorker Magazine*: Absent Material Change in Statement's Meaning, Deliberate Alteration of Speaker's Words by Author Not Actual Malice

Ellen Poris

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Voters' Rights Act of 1965 as amended in 1982. The Act in part states that, [a] violation . . . is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect 'representatives' of their choice.

Chisom, 111 S. Ct. at 2364 (quoting Voters' Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. 1973).

The Court then reviewed *LULAC* and rejected the respondent's claim that Congress' use of the word "representatives" in Section 2(b) of the Voters' Rights Act was evidence of congressional intent to exclude judicial elections from coverage. *Id.* at 2364. The Court noted the *LULAC* court's distinction of Section 2(b) providing two separate protections of minority voting rights. *Id.*

The Court reasoned that the *LULAC* majority created two tests. One test was to be applied when the right of individuals to participate in the political process was frustrated, such as by time and location disincentives that result in depriving a class of people of the opportunity to vote. *Id.* at 2365. The second part of the *LULAC* Section 2(b) test involved the denial of the voters' "opportunity to elect representatives of their choice." *Id.* at 2364 (quoting *LULAC*, 914 F.2d at 625.)

In rejecting the dual reading of Section 2(b), the Court reasoned that to substitute the word "or" for the word "and" in interpreting Section 2 would destroy the plain meaning of the sentence. *Id.* at 2365. The Court determined that such a radical reconstruction would be necessary to separate the opportunity to participate in the political process from the opportunity

to elect representatives. *Id.*

The Court referred to its analysis in *White v. Regester*, 412 U.S. 755 (1973) and *Whitcomb v. Chavis*, 403 U.S. 124 (1971) in identifying the language from which Section 2 is patterned. *Chisom*, 110 S. Ct. at 2365. In both of these cases, the Court found the opportunity to participate in the political process inextricably connected to the opportunity to elect representatives. *Id.*

The Court opined that further support for their interpretation of "representatives" as including judicial elections was evidenced by Congress' replacing the word "legislators" with "representatives" when adopting the language of the Court in *White v. Regester*. *Chisom*, 110 S. Ct. at 2366. The Court reasoned that the substitution of "representatives" for "legislators" indicates that Congress intended the phrase to cover more than legislative elections. *Id.*

The Court next likened the inclusion of sheriffs, prosecutors, state treasurers, and other elected officials chosen by popular elections as "representatives" to judges who are chosen by popular elections. *Id.* The Court determined that the word "representative" refers to someone who prevails in a popular election, within which judicial elections exist. *Id.*

Lastly, the Court found their interpretation of Section 2 consistent with the broad remedial purpose of ridding the country of racial discrimination in voting, upon which the Voters' Rights Act of 1965 was enacted. *Id.* at 2368. In applying the Voters' Rights Act, the Court noted its policy statement in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), providing that the Act should be broadly read to combat discrimination. *Chisom*, 110 S. Ct. at 2368.

The decision in *Chisom* is significant as it disallows race based voter dilution or "gerrymandering" of electoral districts in judicial elections through narrowly interpreting Section 2 of the Voters' Rights Act of 1965.

Chisom is also important as it represents the Court's continuation of the liberal application of the test for finding a violation of the Voters' Rights Act of 1965.

- Daryl D. Jones

Masson v. New Yorker Magazine:
ABSENT MATERIAL CHANGE IN STATEMENT'S MEANING, DELIBERATE ALTERATION OF SPEAKER'S WORDS BY AUTHOR NOT ACTUAL MALICE.

In *Masson v. New Yorker Magazine*, 111 S.Ct. 2419 (1991), the United States Supreme Court held that an author's alteration of a speaker's statements did not amount to actual malice for defamation purposes unless such an alteration resulted in a material change in the statement's meaning. Thus, the Court rejected the argument that any alteration of a speaker's words beyond those made for grammar or syntax proved knowledge of falsity or reckless disregard for the truth.

Plaintiff, Jeffrey Masson, claimed he was defamed by article author Janet Malcolm when she used quotation marks to attribute to Masson comments he alleged he did not make. Malcolm interviewed Masson, a noted psychoanalyst and former Projects Director of the Sigmund Freud Archives, for an article she was writing about him for *The New Yorker* magazine. Prior to the publication of the article, Masson expressed concern to the fact-checking department of the magazine about a number of errors in several passages. Despite these concerns, the article appeared in the magazine as a two-part series in 1983, and in 1984 Respondent, Alfred A. Knopf, Inc., published the entire series as a book.

Masson brought a libel action against Malcolm, *New Yorker Magazine*, and Alfred Knopf, Inc. under California libel law in the United States District Court for the Northern District of California. The parties agreed that Masson was a public fig-

ure and as such, could sustain his action for defamation only if he proved the defendants acted with actual malice, that is with knowledge of falsity or reckless disregard for the truth. The trial court granted the defendants' motion for summary judgment, concluding that the alleged alterations were "substantially true" or were "rational interpretations" of Malcolm's conversations with Masson. Thus, the court found that the passages did not rise to the level of actual malice as required by *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Court of Appeals for the Ninth Circuit affirmed, and the Supreme Court granted certiorari, reversed and remanded.

The Supreme Court began by reviewing the six passages Masson alleged were defamatory. The Court found that while each of the six passages purported to quote Masson's statements to Malcolm, Masson made no such identical statements in any of the over 40 hours of taped interviews. *Masson*, 111 S. Ct. at 2425-28. The Court then discussed the use of quotation marks, and explained that generally quotation marks are used to attribute to a speaker words spoken by him verbatim. *Id.* at 2430. Quotation marks further differentiate between those words directly from the speaker and those of the author. *Id.*

Second, the Court explained that quotation marks can also be interpreted by a reader as non-literal or reconstructions of a speaker's statement, so that the reader would not reasonably believe the quoted passages indicated reproductions of actual conversations. *Id.* at 2430-31. In the instant case, however, the Court found that Malcolm gave no indications to the reader that the quoted statements were not the actual reproductions of Masson's statements. *Id.* at 2431. The Court therefore found that a reasonable reader could, in fact, believe the quoted passages were the verbatim statements of Masson. *Id.*

The Court next considered whether any alteration of a verbatim quotation

proved falsity for defamation liability. While the Court noted that in some sense any alteration of a quoted passage was false, the Court reasoned that grammar and syntax often necessitate such alterations. *Id.*

The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy.

Id. at 2432. Thus, the Court refused to recognize that any alteration, including a deliberate alteration, beyond those made for grammar and syntax proved falsity unless such alteration resulted in a material change in the meaning the statement conveyed. *Id.* at 2433.

The Court next examined the issue of whether an altered quotation was protected so long as it was a "rational interpretation" of the speaker's actual statement. *Id.* The Court rejected the court of appeals' reasoning on this issue, finding no support in either the principles of defamation or First Amendment jurisprudence. *Id.* The Court explained that in this case, the use of quotations was to inform the reader of Masson's statements, not the rational interpretations of such statements by the author. *Id.* at 2434. The Court stated that adopting a rational interpretation standard "would give journalists the freedom to place statements in their subjects' mouths without fear of liability [and] would diminish to a great degree the trustworthiness of the printed word, and eliminate the real meaning of quotations." *Id.*

In this case, the Court found that five of the six disputed passages did, in fact, differ materially in meaning from the tape-recorded statements so as to give rise to an issue of fact for a

jury to decide regarding falsity. The Court held that absent a material change in the meaning of a speaker's statements, a deliberately-altered quotation will not subject the author to liability for defamation.

Justice White, concurring in part and dissenting in part, disagreed with the majority's holding that a deliberate alteration of a quotation did not rise to the level of falsity unless the alteration was a material change in the meaning of the statement. *Id.* at 2437. Justice White referred to *New York Times v. Sullivan*, which held that any known falsehood was sufficient proof of malice. *Id.* at 2438. Justice White observed that "[t]he falsehood, apparently, must be substantial; the reporter may lie a little, but not too much." *Id.*

The court expanded the scope of protection for authors by allowing them to deliberately alter a speaker's words and then place those words in quotation marks. The Court in *Masson* stopped a bit short and refused to widen that expansion to include altered quotations which were rational interpretations of the speaker's statements. Prior to this decision, a reader seeing quotation marks around a passage would have reasoned the quoted passage to be a verbatim duplication of the speaker's words. Now, the reader must beware: writers and journalists have the permission of the Supreme Court to alter a speaker's words and put that alteration in quotation marks.

- Ellen Poris

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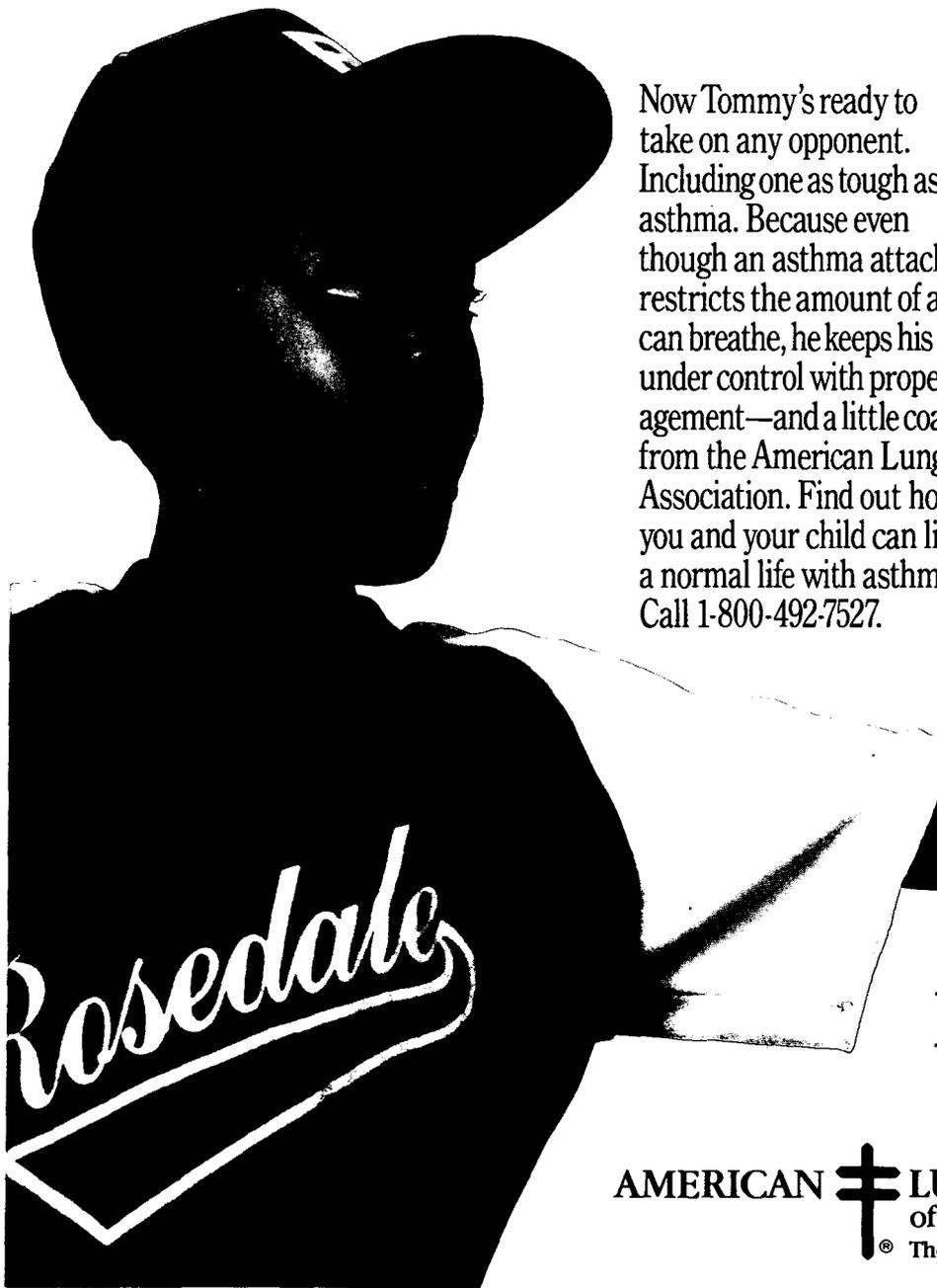
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