

ORAL ARGUMENT — 11/3/99
98-1018
HUCKABEE V. TIME WARNER

FRANZETTI: This case involves defamation of Dean Huckabee in a film broadcast by HBO entitled "Women on Trial." The film purports to be a documentary that tells a shocking but true story, that despite overwhelming evidence and uncontroverted evidence, that a 5-year old boy had been sexually abused by his father, Dean Huckabee ignored his duty as a judge to protect the best interest of that child and awarded custody to the abusive father and took that child out of his protective mother's home. The film also told that Judge Huckabee routinely made such decisions and left the indelible impression that, as a result, Judge Huckabee must be corrupt.

The story, however, was not true. The truth was that the boy had suffered an injury to his penis that was not done by the father during his custody. Evidence which was known to HBO prior to the presentation of that broadcast shows that the child was injured in his mother's house at the hands of his brother, who was nearly 6 years older.

PHILLIPS: Do you think that this court can find what you just said as to be true as a matter of law?

FRANZETTI: No. It is what the...

PHILLIPS: That's another version?

FRANZETTI: It's not exactly another version. It's what the evidence shows and all inferences on summary judgment are to be drawn in favor of the nonmovant, which is Dean Huckabee's position in this court.

PHILLIPS: That's true even in a summary judgment in a defamation case?

FRANZETTI: Yes. There may be conflicting evidence of what was known. First of all, there is no conflicting evidence as to what was known to HBO. They had actual knowledge of the fact that there was evidence showing that the brother had injured the child in the mother's home.

PHILLIPS: Who is the "they" at HBO that had this knowledge?

FRANZETTI: Virginia Cox and Lee Grant, who were checking for the accuracy of these details and...

PHILLIPS: They were independent film producers were they not?

FRANZETTI: HBO was relying upon them for the accuracy - or it says they were relying on

them for the accuracy of this film.

PHILLIPS: Anything that they know is imputed to HBO for liability purposes?

FRANZETTI: I wouldn't say that everything is, but in this case these are central and core points. They have been charged with getting the accuracy of this story right.

ENOCH: HBO published this?

FRANZETTI: That's correct.

ENOCH: So HBO has its own duty to check the accuracy of what it publishes doesn't it?

FRANZETTI: And indeed, they spent 6 months in legal review on the various points...

ENOCH: I understand that's your position. They spent more time talking to their lawyers about whether they would be liable than in checking out the truth of the statements?

FRANZETTI: Yes.

HECHT: Much of this story is reporting one side's position in the case. That's okay isn't it?

FRANZETTI: If they said that's what they were doing. But that's not what the film says. The film says, These are the facts.

HECHT: Where does it say that?

FRANZETTI: The film never says there's another side to this story. The film never says, We're presenting the mother's side. The film only says, This is what is going on. It starts out, We are bringing you stories of medieval justice, irrational decisions. They are not saying there's two sides to this.

PHILLIPS: Judge Huckabee's on film, he explains the child in the first video(?) is brainwashed, and they draw a conclusion. Why is that defamation?

FRANZETTI: Once they found that there were other versions of this story. Initially the film company had submitted to HBO a pitch piece that said, Corrupt Judge Awards Custody to Abusing Father to Please His Crony Friends. Then they went out and started doing research. They had not done the research up until then. They had third-hand hearsay up to that point in time. What is in the film is really no better than that. When they found evidence that in fact the abuse didn't occur at the

ENOCH: Well there's a difference in a documentary on the conclusion being demonstrated as an opinion, and what is ostensibly being demonstrated as the facts upon which the opinion is being made. So the distinction is not an opinion. The distinction is, what do they represent to be the facts that lead to their opinion?

FRANZETTI: That's correct.

ENOCH: And in this case your position is that they specifically excluded the facts that are material to forming that opinion leaving the viewer to one only inescapable conclusion?

FRANZETTI: Not only do they lead viewer to that conclusion, they say there is only one. That's the message. There is no other conclusion in this case.

HANKINSON: In a defamation case in state court in Texas what must a plaintiff do to avoid a summary judgment when the defendant moves on the grounds that there is an absence of proof of actual malice?

FRANZETTI: First, the defendant comes forward with affidavit saying, I did everything right.

HANKINSON: Presuming that's happened, what must a plaintiff do to avoid a summary judgment?

FRANZETTI: Then a plaintiff must come forward with evidence showing that there was actual malice. And actual malice has...

HANKINSON: To what level? Must they just show that a fact issue exists or must they offer clear and convincing evidence?

FRANZETTI: This court in *Casso v. Brand* and *Carr v. Brasher* said specifically, They need not offer clear and convincing evidence at that stage. There are several reasons for that. Clear and convincing evidence is really in Texas procedure an admonition to the trial judge to review the evidence after the jury has found the facts.

PHILLIPS: Is that true in a defamation case where there's a constitutional component?

FRANZETTI: I believe that's an issue of Texas procedure. And the judge is charged with looking at the evidence and making sure that any jury verdict has been found on clear and convincing evidence. That is the constitutional duty.

HECHT: You have to show clear and convincing evidence to get a judgment?

FRANZETTI: Ultimately.

HECHT: Policy wise besides *Casso*, why shouldn't you have to do it in the summary judgment stage? If you're not going to be able to win why not know it at the summary judgment stage?

FRANZETTI: In this case, this case came long before there were no evidence summary judgment motions. But to say that you have to produce clear and convincing evidence at the summary judgment stage strips away the protection that a nonmovant has of having the inferences drawn in his favor.

HECHT: The other side says it strips away their first amendment rights if you don't have it?

FRANZETTI: This court has decided that that does not strip away their first amendment right. That is an issue of Texas Procedure and the other way is the issue of Federal Procedure.

HANKINSON: Should this court reconsider its position in *Casso*?

FRANZETTI: I don't see anything in *Casso* that needs to be reconsidered.

HANKINSON: How about in light of the new Texas No-Evidence Summary Judgment Procedure?

FRANZETTI: Again, this case didn't arise under that.

HANKINSON: Assuming it did?

FRANZETTI: Well that's what the amicus is arguing for in this case.

HANKINSON: And I'm giving you the opportunity to answer their question.

FRANZETTI: Again, as far as the clear and convincing evidence standard on this case is concerned, that is stripping away the rights that the plaintiff has of having the inferences drawn in his favor on the summary judgment stage. And this court has said, We are not giving a special procedure to defamation defendants. And I don't think that is stripped away from defamation or from regular defendants in regular summary judgment proceedings on a no evidence summary judgment motion. You still have the inferences drawn in your favor.

HANKINSON: On this record, did the plaintiff raise a fact issue or is there anyway this record can be interpreted in your opinion to rise to the level of presenting clear and convincing controverting proof?

FRANZETTI: I think it doesn't matter what standard you judge this case on. I think it is clear and convincing evidence. Because what we have in this case is HBO primarily videotaped everything they did. There is not a question as to what they knew, when they knew it, what they left on the cutting room floor, and what they chose not to show to the public.

HANKINSON: And what evidence do you rely upon as your controverting proof on actual malice?

FRANZETTI: First of all, the story line says that women routinely lose custody of their children to the abusing father when they allege child abuse. They knew that was false. Because the only evidence they have on this, the only facts they found on this was Judge Huckabee's interview where he said, This had happened 4 times, in thousands of cases over 12 years. They didn't interview any other lawyers involved in this case other than the mother's lawyers. They didn't interview any other judges. They didn't go to the court records to see how routine this was. They just made the ball-face statement, This is routine.

HECHT: To put a very fine point on it though it says, Custody, not access. The story talks about access.

FRANZETTI: That is a fine point. But they would like to dumb it down to that. But they have been talking about access to a child. They said, All access has been cut off. And then to say that in a broadcast where that flips by very quickly, the ordinary viewer is going to see the difference between losing custody and losing access as a fine point...

PHILLIPS: Well talking about the ordinary viewer, there is two ____ about Judge Huckabee in here. And you talk quite a bit about the first one, but not about the second one. These remarks about routinely, ordinarily cases from one courthouse, they are very quick as compared to a long 12-15 minute segment about a case. And at least in the second case, you don't seem to question any of the essential facts that are presented by the documentary as to that story. Don't we have a substantial truth issue here that is the overall gravamen of the story and the part that is true and not controverted may leave a worse impression in the viewer's minds than a segment that you may have more question about or one sentence or a voice over that you may have an attack on, and if that's the case, aren't there doctrines in substantial truth that would give you trouble ever meeting the constitutional standard in an ultimate proceeding?

FRANZETTI: There's not substantial truth on that one either. The actual defamatory statements were made in connection with the *Abair(?)* case. The *Roberts* and *Rachke(?)* case form part of the theme that Judge Huckabee is a corrupt judge. That is not just substantial truth. That is not what the evidence shows.

PHILLIPS: There was a lengthy explanation by one of the interviewees about what they meant by corrupt, which was not one meaning of "corrupt", that is you receive the payment of X

number of dollars in exchange for a pre-determined result. But it was corrupt in terms of judges maybe trusting the evidence that was presented by one lawyer more than the evidence presented by other lawyers and having friends and so on and so forth.

FRANZETTI: The words said during the film are: They have a financial interest in protecting the system because they are making money off these appointments. These are words that are used. And you're right, they also go off on the other idea, but they talk about financial interest and they say, What other reason can there be? These decisions are so irrational, what other basis can there be but corruption?

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RESPONDENT

FORD: Judge Huckabee had to come up with proof that HBO knew the film was false or that it in fact had actual serious doubts about the truth of the film.

O'NEILL: Or, there was purposeful avoidance of the truth?

FORD: The theory of purposeful avoidance is a way to prove the serious doubt. It's not a third category.

O'NEILL: What about the fact that the father was not interviewed. Don't you think that's pretty substantial?

FORD: First of all, they tried to interview the father, they negotiated with him for awhile, and he finally backed out.

O'NEILL: Is that in the summary judgment proof?

FORD: Yes. There's no question that they tried to interview both fathers.

ENOCH: Part of Huckabee's position is that this is a trial of the case for which there was testimony on both sides upon which the judge makes a decision. This is not a situation where somebody made some sort of public pronouncement and there's a question raised about how ridiculous that announcement was. This was a position that a judge made a decision on custody and access. And the implication was this was the story before the judge on which the judge's decision was made. Is it not something to be factored in this mix on avoidance of the truth and what was known, the failure to look at the record before the TC, or having looked at the record before the TC the choice of not presenting that record, not interviewing witnesses, but in fact not presenting the record that was before the TC, but only the statement of the mother. Could that not rise to the level of avoidance of the truth in the context of its demonstrating the judge's decision is faulted?

FORD: Two answers to that question: 1) on the facts of this case to clarify what the facts were; and 2), on what the law is. The facts of the case are that contrary to what Judge Huckabee has tried to suggest, the evidence that a court appointed psychologist came up with an opinion that someone other than the father had abused the boy had absolutely nothing to do with Judge Huckabee's decision to take the child from his mother. It's Kitt Harrison's opinion. He wasn't even appointed to the case until 2-months after Judge Huckabee had taken the boy away, didn't reach his opinion until 5-months later.

ENOCH: The position they take is this was the record before the judge in making the decision. And you're saying that was not true?

FORD: Absolutely wrong. It is not there. What was before the judge is uncontested, it's in the evidence, it's in the pleadings and the transcript of this hearing that took place in March 1988. And it's uncontested that the filmmakers did read that transcript, talked to the lawyers that were involved in the case. The transcript is in the evidence by the way. And there is no evidence that the brother did it. At best what you have at the end of the hearing is the father's lawyer is arguing that it was anybody but his client. And so he suggests in argument only that, Well let's see, the little boy screamed and cried when he got home, so that must have been when the injury happened, which is contrary to what the doctor's testimony was, which was the injury could have happened while the child was with the father or while the child was home with his mother. So we don't know. But in any event, Mike Abair's lawyer says, Could have been Sandy, the mother that did it. It could have been John, the brother, or little Wayne could have done it to himself in a fit of rage that night. That is all there is in the record to show who done it. And that's all that was before Judge Huckabee at the time he made his decision, and the filmmakers knew that.

The filmmakers talk about what the evidence was before Judge Huckabee. And see the problem here is that Judge Huckabee wants HOB to be legally required to say that Kitt Harrison thought, Kitt Harrison's opinion, and it was only Kitt Harrison who thought that Wayne had been sexually abused by his 12-year old brother, John. And this argument doesn't make any sense. First of all because it had nothing to do with Judge Huckabee's decision. This was something that happened months after the decision. And when you look at the film, you will see why this doesn't make any sense. The film shows Sandy's lawyer saying, Judge Huckabee thinks this is the most classic case of brainwashing he's ever seen. And then the film shows Judge Huckabee describing the reasons for his ruling. And he says in the film, I have to do what I think is best for the child. In my opinion if someone's brainwashing a child, especially coupled with some physical abuse, the child has to be removed from that situation. And he later says, If a person is sexually abusing a child they are probably going to have to seek mental health care. And at this point, the viewer has been told that Judge Huckabee thinks that Sandy or someone else other than the father had either physically or sexually abused the boy, and Judge Huckabee thought he needed to take Wayne away from that situation. Which is exactly of course what Judge Huckabee says the truth is.

PHILLIPS: Did you move for summary judgment and support it with summary judgment

proof on any grounds other than lack of actual malice as a matter of law?

FORD: Actual malice was our last grounds for summary judgment.

PHILLIPS: There's a bunch of grounds in there, but are the other allegations supported by enough evidence in the summary judgment record to sustain a CA's decision?

FORD: Absolutely. The evidence was uncontested. What the record has in it is that all of the factual descriptions of what happened in court, the pleadings, the allegations of the summary of the evidence all of that is true or substantially true. That was the first grounds we moved on. It was only later after discovery we came back and did actual malice as well.

HANKINSON: But this was a broad form summary judgment order in this case?

FORD: Yes.

HANKINSON: So if we were to agree with petitioner in this case, this is a remand to the CA to consider your other grounds for summary judgment on appeal, is that correct?

FORD: That is one option. However, everything is before this court, the entire record is before the court. There is no reason why this court if it wanted to look at the factual issues to decide whether or not the facts in the film were true it certainly should do that. It's before this court and Judge Huckabee invited this court to look at the other grounds.

HANKINSON: Does it matter in this case what standard of proof we hold the petitioner to in controverting your proof of the absence of actual malice?

FORD: In this case it doesn't matter at all.

HANKINSON: They didn't even raise a fact issue?

FORD: The CA properly found that there was no proof of actual malice. It did articulate a standard, the same standard that's followed by the Dallas CA, by the San Antonio CA, the Houston 1st District CA, which is, they said the plaintiff needed to come up with specific affirmative proof. But then it turned around and said, there was no proof.

ABBOTT: Give me an example of specific affirmative proof of malice?

FORD: Fabrication has been quite successful. If there is evidence that the defendant simply made up a story, that has been held. There is a case out of San Antonio where the...

ABBOTT: What about avoidance of factual matters?

FORD: Purposeful avoidance of the truth is built into the analysis of whether the defendant had actual serious doubts about the truth. And the SC case said, this could be circumstantial evidence of actual doubt. And in that case, the evidence was you a - first a big important difference here - you had a false statement of fact about the plaintiff in that case. And then you had evidence that the newspaper checked into other sources but there were two sources where they absolutely couldn't check and verify that this was true, and they didn't. They relied solely on 1) an unreliable witness; and 2) the tape of the critical conversation that the witness was describing was handed to the newspaper.

ABBOTT: So what you're saying then is based upon your test when any media outlet reports on a lawsuit, which inherently has at least two sides, if the outlet ignores one side and reports only the other side to the detriment of some party, that wouldn't be sufficient to establish malice?

FORD: No. Here's the problem. When the media reports on a lawsuit, on a trial, they are privileged to repeat the bad things that the two parties were saying about each other. Under the common law you couldn't do that. They can say, this horrible evidence and this horrible evidence, and that goes to protect them from liability against the litigants themselves. When it comes to criticizing a judge, and a judge is our government, and what a judge did, there is no obligation to come up with one side or the other.

HECHT: But this isn't about whether Judge Huckabee got it wrong or not. This is about whether he's corrupt. This film is a nonstory if they just said, Well one more judge got the wrong decision. So! And that happens all the time. But the point of this is, there is something terrible going on here and people are getting it wrong for bad, evil reasons. Isn't that the point of the film?

FORD: The main point of the film is that the judges are getting it wrong because they are overreacting to allegations of abuse in custody proceedings.

HECHT: What does contributions to the judge have to do with that?

FORD: Nothing.

HECHT: Well then why is that in the film?

FORD: It is in the film with the second segment that has nothing to do with Judge Huckabee. And it was absolutely a huge on-going controversy in Houston, that everything you hear about the corruption and contributions influencing judges, that's all in the record. The Houston Chronicle had been running stories for months and months about this.

HECHT: They don't say corrupt strangely.

FORD: The stories in the Houston Chronicle say, that the family law courts are ripe

with tales of cronyism, corruption and bias. Particularly in the area of custody abuse.

HECHT: It says, fraught with tales of cronyism of financial and sexual inequities and of attorneys who feel pressure to contribute to judge's campaigns. Do you think that translates into corruption?

FORD: The film doesn't translate into corruption. There is nothing in the film, nothing that suggests corruption.

PHILLIPS: But they use that word.

FORD: They do not. That word "corrupt" or "corruption" is not in the film. I don't think the word "corrupt" was used. The segment is Christy Myers saying, What's going on here? She says, There are things going on that aren't in the evidence of the court. And again, this has nothing to do with Judge Huckabee. This is Judge Daggett's story and it's all straight out of the press. Christy Myers from Channel 13 says, Because of the campaign contributions it's not overt, it's just this judge knows the lawyer. And the lawyer says, Trust me, my client is not going to do anything bad. And the judge says, Okay, I trust this guy, he's not going to do anything bad.

ENOCH: The point of the story was not that the judge got the wrong decision. The point of the story is that the judge was corrupt.

FORD: I cannot think of how that could possibly be a reasonable interpretation of the film, that it says Judge Huckabee is corrupt.

ENOCH: You're serious?

FORD: I am absolutely serious.

HECHT: People should walk away from that film thinking he's the greatest guy in the world. Just a little dumb.

FORD: I think the implication of the film is that Judge Huckabee made some very bad decisions, that he was far too harsh, unsympathetic to mothers, didn't listen to what the evidence - what the little children were saying. All very general implications. The point of all of this is, is those implications are not false statements of fact. We have 4 constitutional protections. Each one of those are at work in this case. And they are all summarized in *Milkovich v. Loraine Journal(?)*, 497 US 1. The first protection is that on matters of public concern to be actionable a statement has to be a provably false statement of fact.

HECHT: If at the end of this film the producer had come back on and said, Well we've looked at this and it is our conclusion that these judges are corrupt and are making decisions for

illicit reasons. That wouldn't be defamatory? You wouldn't have an actual malice problem there?

FORD: Those are two questions. Would the conclusion based on what was said in the film that we think these judges are corrupt? I don't think that would be an actionable statement. Because in the context of this film, remember this is political speech, this is core first amendment speech. We get to say, I know y'all don't like it, but we get to say, the courts are making bad rulings and we don't like it, and we're very, very suspicious about why they are making those rulings. We get to say that. This is absolutely protected under the constitution.

O'NEILL: Would you agree that if no effort had been made to interview the father, that would be some evidence of purposeful avoidance of the truth to avoid summary judgment?

FORD: No, because I have to follow-up with evidence of purposeful avoidance of the truth which gets to the question of what is the truth? Which then asks the question, What is the false fact issue in the film?

O'NEILL: No, we are talking about purposeful avoidance of the truth.

FORD: Right. And to answer your question, the truth has to be out there contrary to a published false statement. A false statement of fact.

O'NEILL: How do you know something is true or false if you haven't interviewed the father?

FORD: Because the facts in the case were all in the record. They read the transcript.

O'NEILL: So even if there had been no effort whatsoever to interview the father, you would say that is no evidence of purposeful avoidance of the truth?

FORD: Yes, because it's what the film said that counts.

O'NEILL: What about the cases that talk about failure to examine or talk to a witness who has knowledge can be evidence, the San Antonio case, for example?

FORD: I'm not familiar with that.

O'NEILL: A reference to a San Antonio case where they did not go out and interview two people who would have knowledge about the case, that would have shed light on the truth of what was reported.

FORD: Those cases all involved situations where we're not talking about reporting on a court proceeding. Those cases all talk about, Mary said this, Joe said this, out there in the world

whatever. What this film is talking about is what happened in a court.

O'NEILL: If it's a court proceeding you're saying - how would you ever have purposeful avoidance of the truth if you have a court proceeding? Are you saying there just is no such thing? Can you pose a scenario where there could be purposeful avoidance of the truth in a court proceeding?

FORD: I'm having trouble coming up with an example, because what happened in the court is all objective evidence. I guess if an order said, The judge said that he was going to cut-off a little boy's arm, and that's not what happened in court and they just heard this from one woman and they didn't go back to look at the court records to see if that happened, yes, that would be a case of purposeful avoidance.

ABBOTT: What if you have a situation where plaintiff sues defendant and the media outlet presents all the facts favorable to the plaintiff, a very compelling story and presents no facts that came out at trial favorable to defendant, but yet the trial judge rendered a take nothing judgment in favor of the defendant. And after the end of a 30-minute presentation the media outlet says, we believe there can only be one reason why the judge did this, and that's because the defense lawyer contributed to the judge's campaign. No problem?

FORD: Is the fact that the defense lawyer contributed to the judge's campaign a true fact in your hypo?

ABBOTT: Yes.

FORD: Yes, that's not actionable.

ENOCH: It reminds me of the statement, It's accurate but not true.

FORD: Here's the deal. With judges that's the rule. And the 9th circuit put it beautifully in *ABC v. Dodds*. Judge Dodds was unhappy about a prime time broadcast. And he had a list of implied statements very similar to the ones here and those complaints had been dismissed by the TC, the 9th circuit affirmed. And what they said was that, When you're talking about this core political speech, because remember we're not criticizing the man, Judge Huckabee, we are criticizing the governmental agent...

HECHT: That's preposterous! For somebody to say that a judge is doing things for corrupt reasons is not slamming the judge individually?

FORD: Corrupt is one thing. You have to make a specific allegation of corruption in that situation.

HECHT: But to say Judge Huckabee is different from the person Huckabee when he's sitting up there in a robe and talking on the tv cameras is just ludicrous. We weren't really talking about the judge himself, we were just talking about whatever was sitting in a black robe. That's crazy.

FORD: That's the way it has to be. Because the judge is the government and citizens have to be able to criticize...

HECHT: I don't disagree with that. But you said it wasn't aimed at him individually and it clearly was.

FORD: We didn't say anything about him being corrupt. All we did was criticize his two decisions. That's it. And to say that the film implies a statement of fact that Judge Huckabee in fact made these decisions because he had taken some kind of bribe, that's ludicrous, that is not a reasonable interpretation of this film. It can't be.

PHILLIPS: Your position has been it really doesn't matter how we break down the legal requirements particularly on behalf of the plaintiff in this case, that HBO can win on anything I suppose. Let's suppose the court gets confused in some of the details and it does start to matter, would you discuss why you believe that to prevent a summary judgment a public figure plaintiff must present a quantum of evidence that's greater than just some evidence? Why should a trial judge be given in a special case the power to go in and re-weigh the evidence and say that the summary judgment should be sustained unless it's clear and convincing? Is that a constitutional requirement or is that just _____ policy for a more efficient government?

FORD: First of all, in this case it wouldn't matter which standard...but the amicus are urging that this court reconsider its findings and its decision to not follow *Anderson v. Liberty* _____.

PHILLIPS: And is that your position?

FORD: I think it would be a very good ideal for this court to reconsider that and here's why. The issue of actual malice is a constitutional issue. And the CA after a trial will be evaluating the evidence, completely independent evaluation of the evidence, to see if clear and convincing evidence was there. That's the law.

HECHT: Because it's a legal question, you agree it's a legal question constitutionally?

FORD: It is a legal question. And as a practical matter if it is clear before trial that the plaintiff cannot come up with what it takes to show that the defendants seriously doubted the truth, if they have no evidence that they can show that with...

PHILLIPS: Well we are back to no evidence, _____ standard that Texas judges are familiar with. I'm asking whether or not in the course of this opinion if we get this far we should look at whether or not it's constitutionally required that we put this regular burden on trial judges, and if it's not would it still be better policy?

FORD: The US SC has never said that it's constitutionally required.

PHILLIPS: Do you think it's constitutionally required that there be any summary judgment proceeding in a defamation case?

FORD: I don't know the answer to that question. It's never been presented to the US SC. I certainly think as a matter of Texas policy, that not only should this be something resolved at summary judgment, but...

PHILLIPS: Well we didn't have summary judgments until 1950 and there's been judges on this court since then who thought we ought to repeal the summary judgment rulings. And my question is, would we be free agents to do that?

FORD: I would be happy to take that view and I think I might win on it.

PHILLIPS: Is there any constitutional issue beyond that? You've said there's not. The US SC hasn't spoken on that?

FORD: They've not spoken on that issue. This court has, in fact, you did. And you were right. In the sense we have to be sensitive to the constitutional issue going on here, which is every single time a judge sues somebody and says, You criticized me unfairly, I'm going to sue you, that is going to serve to muzzle the citizen's rights to criticize judges' rulings. And that is a very important interest that has to be protected. And then as a practical matter if you can see down the line that the plaintiff is not going to meet their burden, why would you go through the trial, the trauma and expense of the trial especially when the balance of that is the chilling effect on free speech.

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REBUTTAL

O'NEILL: Do you agree that judicial proceedings are entitled to this extra degree of protection? What I understand present counsel said that you cannot purposefully avoid the truth, but in a judicial proceeding you can decide not to go interview people with knowledge and rely on the record. Do you agree with that assessment?

FRANZETTI: No. Because what HBO is trying to do in this case is take statements of fact, statements that they had presented as fact in the case, not as opinion. They have said, these decisions

were irrational. If they are irrational go find out whether there is no evidence on the other side. That's what they said.

HECHT: I just don't see how irrational can be something other than opinion. Whether the sun is up or not is a fact, whether you're not making any sense is a matter of opinion.

FRANZETTI: In some context, that's true. But what they said here was, they interwove routinely loses custody, irrational decisions and came to the conclusion of corrupt judge.

PHILLIPS: Your opposing counsel said it wasn't in the transcript. I spent 5 minutes of the argument looking for it. I can't find it.

FRANZETTI: The word "corrupt" does not appear in the transcript. However, they've got to be awfully bad filmmakers if that's not what they intended to say because that was the whole intent from day one when this concept was _____, was to show a corrupt judge handing custody to an abusive father and cutting off all access to the mother.

ENOCH: I agree that that's what the tape tries to convey. And the documentary is designed to convey that information. But it seems to me that if any of the discrete statements about the record before the TC is correct and they haven't left out any material piece of evidence upon which the judge had any other basis for deciding the case, then is the representation overall accurate and leave me only with the conclusion that if that's what was before the judge when the judge made the decision, then they are free to decide the judge was irrational and say so?

FRANZETTI: If that were true in this case, I might have to agree with that. But that isn't true in this case. They didn't show the fact that the child had told the CPS worker, My mommy told me to give that other story the first time. They knew that. They didn't talk about the facts from the child to his mother saying, John did it. That wasn't in the film. There is no reference of anything like that. What the message of the film is, there is no way anybody could have made an _____ decision. And it's the message of the film that counts. Every case has to look at what the gist of the message that's being said in order to determine whether or not the message is defamatory.

HECHT: I think they use a word "pro-father" in here some place. Is that opinion or fact? What is your view on that?

FRANZETTI: Pro-father is probably an opinion. But again, opinion and fact - the distinction between that was taken away by the SC in *Milkovich*. And sometimes a statement of what appears to be opinion is really a statement of fact and can be defamatory.

ENOCH: If the documentary is based on a judge's decision it seems to me that the only thing that would be relevant would be what was in the record before the judge when the judge made that decision. Ms. Ford's response has been that everything they said about the record before the

judge upon which the judge based his decision was true. You argue that the conclusion of irrational is not true. But her point is, if everything we've said, the facts that we've said are true, she goes so far as to say we don't have to say anything about the defendant's facts, then we are protected. You've argued there is an avoidance of the truth issue, which implicates there are other people you should have talked to. If it's a trial case, then it seems to me that means there is something in the record before the trial judge that would have demonstrated that if all these things being true actually were false what in the trial record was intentionally avoided or recklessly avoided that would have demonstrated the plaintiff's record before the TC was false? And you've identified the CPS statement that the mother told the child what to say. Is there anything else?

FRANZETTI: That's one issue. The other thing we have to remember in this case, this was presented as a documentary. This was not presented as an Opt Ad piece. This is what is going on in the world. That's what they said. So it's not a report of the entire case. They made a report of the mother's version of this case. There was plenty of evidence to show brainwashing of the child. There was plenty of evidence at the hearing stage to show that the father did not do it, that the injury occurred outside the father's...

ENOCH: They are arguing at the hearing stage, they said that was not before the court until 2 months after the judge had removed the child from the mother. Is that wrong?

FRANZETTI: That is wrong. That evidence was before the court at the time of the hearing. It just wasn't from Kitt Harrison at that point. But that evidence was at the hearing in front of Judge Huckabee.

ENOCH: Was it a written report? What was this thing that was before the TC?

FRANZETTI: We have videotapes of the CPS workers interviewing Wayne. Two of those were viewed by Judge Huckabee and he saw the one in which the child said, My mommy told me to say it that way.

ENOCH: I said that's a piece of evidence that you say was there. I said was there any other piece of evidence that was before him, and I'm talking specifically about the comment that Harrison had identified that the abuser may have been the older brother who was living in the mother's home? She said, that wasn't even there until after the decision.

FRANZETTI: That was there. It was there in the form of other testimony and evidence in front of the court.

PHILLIPS: Is the whole case essentially before us as far as the grounds for summary judgment?

FRANZETTI: What's been briefed in this court is just the actual malice issue. That's all the

CA rendered its decision on. We did throw it to your hands to review the briefs below in order to render a decision and even to send this case back down to the TC or render a decision in this court. However, do I think they prevail? Of course not.

PHILLIPS: No, I know that. I know you don't think that. Do they have a summary judgment record that presents all the grounds of their summary judgment to the appellate courts for review?

FRANZETTI: They purport to. They do not. Again, the trial judge denied this summary judgment.

PHILLIPS: You believe you win on the merits, not on the fact that they failed to back it up with a bit of an attempt at an affidavit?

FRANZETTI: That's one of our points, that we do on the merits. But again, the affidavits that were submitted, we say didn't even raise the issue because they weren't free from inconsistency and otherwise credible.