OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1602

TITLE JACK ANDERSON, ET AL., Petitioners V. LIBERTY LOBBY, INC., AND WILLIS A. CARTO

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

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JACK ANDERSON, ET AL., :

Petitioners :

v. : No. 84-1602

LIBERTY LOBBY, INC. :

AND WILLIS A. CARTO :

- -x

Washington, D.C.

Tuesday, December 3, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 o'clock a.m.

APPEARANCES:

DAVID J. BRANSON, ESQ., Washington, D.C.; on behalf of Petitioners.

MARK LANE, ESQ., Washington, D. C.; on behalf of Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will arguments first this morning in Anderson v. Liberty Lobby.

Mr. Branson, you may proceed whenever you're ready.

ORAL ARGUMENT OF DAVID J. BRANSON, ESQ.

ON BEHALF OF THE PETITIONERS

MR. BRANSON: Mr. Chief Justice, and may it please the Court:

This case requires the Court to again consider the proper applications of the standards enunciated 21 years ago in New York Times v. Sullivan. In that case this Courtl held that a jury verdict could not be sustained because that libeled plaintiff did not produce clear and convincing evidence of actual malice. In Time, Inc. v. Pape, this Court applied the clear and convincing standard in reviewing a defendant's motion for a directed verdict under Rule 50 of the Federal Rules of Civil Procedure, and in Bose v. Consumers Union, this Court applied the clear and convincing standard in reviewing -- in a de novo review of a district court determination under Rule 52 of the Federal Rules of Civil Procedure.

The question today is whether the trial courts must apply the clear and convincing standard in public

figure libel cases on a defendant's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

The Petitioners urge this Court to hold that indeed the trial courts are required to apply the clear and convincing standard on a defendant's motion for summary judgment under Rule 56, and therefore we urge this Court to reverse the decision of the Court of Appeals below.

The purpose of Rule 56 has been often stated. it is to pierce the pleadings and to assess the proof in order to determine whether there is a genuine need for trial. The commentators are in agreement that the evidentiary standard for both motions is the same. They agree that there is no genuine need for a trial if it is clear in summary judgment that the trial court would have to grant a directed verdict applying the proper evidentiary standard.

The Court of Appeals in this case disagreed, and the Court of Appeals here set a rule that permits a public figure libel plaintiff to proceed to trial and indeed to complete its case at trial even though it cannot on summary judgment produce clear and convincing evidence of actual malice. And the Court of Appeals gave three reasons for setting this rule, and I would

like to discuss each one seriatim.

The first reason given by the Court of Appeals was that a trial court should not engage in a weighing of the evidence on a motion for summary judgment. The answer to that reason is that a trial court need not do that on a motion for summary judgment, and indeed, the trial court performs no different function on that motion than the trial court performs in evaluating the evidence on a motion for a directed verdict, and since it is clear that the trial court must apply the clear and convincing standard on a motion for a directed verdict, there is no reason that it can't equally apply it on a motion for summary judgment.

QUESTION: But when a motion for a directed verdict is made, the evidence is all in the record, is it not?

MR. BRANSON: The evidence is all in the record that the plaintiff wishes to put before the court at that time, that is correct, Your Honor. And that leads to the second readon --

QUESTION: The plaintiff will have inevitably put his evidence all in at that stage.

MR. BRANSON: That is correct. And that is the reason the Court of Appeals identified as its second reason for not applying the clear and convincing

standard on summary judgment. The Court of Appeals said that this motion is really at a threshold in the litigation. It's the beginning, so to speak. The Court of Appeals said that it would be unfair to make a plaintiff marshal all of its evidence at that state of the litigation, and indeed would turn, the Court of Appeals said, a motion for summary judgment into a time consuming and expensive process if plaintiffs had to marshal all of their evidence at that stage.

But an examination of the facts in this record demonstrates that's not the case. This case was filed in September 1981. At the first status conference the trial judge set a date in August 1982 as the cutoff for discovery. The plaintiffs, Respondents here, took their first deposition in October 1981. The defendants did not file the motion for summary judgment until August of 1982, almost a year after the first deposition was taken. In the interim, the Respondents had served document demands and interrogatory requests which were duly responded to.

On filing the motion for summary judgment by the defendants, the plaintiffs moved the district court for additional time to respond. They asked until October 15, 1982 to take additional discovery, and the district court granted that motion and gave the

Respondent until October 15 to complete discovery, and indeed, the last deposition was taken by the Respondents on October 14, 1982. Therefore, we were not at a threshold stage of litigation. Disocvery had closed. The Respondents had fully utilized the Federal Rules of Discovery. They had made the record then that they wished to make. There was never a complaint to the district court or to the Court of Appeals that the Respondents had in any way been denied an opportunity to develop the record further

Far from being a threshold, we had completed the preparation of the record, and indeed, it would have ben within the discretion of the district court had it denied our motion for summary judgment, to have ordered the parties to trial immediately without any further discovery.

So it cannot be sound policy to take a case like this, or indeed, any case, and tell a libel plaintiff or any plaintiff that they are entitled to go cast a motion for summary judgment on the notion that we are just at a midpoint in the litigation and that after that point is past, they will develop new and additional evidence that might support their case. And that is the justification, the principal justification utilized by the Court of Appeals to support its rule, and we believe

it's fundamentally wrong, both on this record and as a matter of general application.

The third reason offered by the Court of Appeals to support its view was that it recited the dicta of this Court that state of mind does not readily lend itself to summary disposition in any kind of a case.

Our response to that is threefold. First, this Court has never accepted from Rule 56 any class of case. Second, whether or not state of mind or any other evidentiary issue might present itself in a given case does not determine the standard of proof that any plaintiff must meet at any stage of the litigation. Whether the standard is preponderance, both at the summary judgment stage or at the directed verdict stage, the burden of the plaintiff is to produce that sufficient evidence to go beyond that motion, and it does not do to say that, well, there is a type of evidence here that excuses me from my burden, whatever it is, in this kind of a case. And that's what the Court of Appeals has essentially said, that because state of mind is at issue in public figure libel cases, we must lower the standard that the plaintiff is required to meet on a directed verdict and not require tht standard to be met at summary judgment, but that by

definition simply ensures that cases will go to trial on which the district court must grant a directed verdict when the plaintiff has completed his case, and that is wasteful use of judicial resources.

QUESTION: What about credibility questions where there's just a straight conflict between two sets of affidavits on a question of fact?

MR. BRANSON: Your Honor, when that happens, whether it happens at summary judgment or whether a credibility question arises at trial, in the plaintiff's case, the duty of the district court is to draw the inferences in favor of the person opposing the motion, and therefore that result ought to be the same on either motion.

QUESTION: Which means it goes to trial.

MR. BRANSON: Absolutely, if there is a specific fact in dispute at either state of the proceeding, then the plaintiff is entitled to go past those motions and submit the case to the jury for a resolution of that fact.

QUESTION: Well, can the libel plaintiff just rely on his complaint to establish a -- he asserts a -- some -- he attacks the particular statements and says they are false.

MR. BRANSON: Your Honor, the --

QUESTION: The defendant comes back and says they are true. Or he says I thought they were true.

MR. BRANSON: I understand, Your Honor. That question was addressed in the advisory committee notes to the amendment to Rule 56 in 1963.

QUESTION: Yes.

MR. BRANSON: The advisory committee noted that the Third Circuit had adopted that rule.

QUESTION: Mm-hmm.

MR. BRANSON: The Third Circuit had allowed plaintiffs to pass a motion for summary judgment on some evidence and good faith pleadings, and the advisor said we want to change that rule. We want to require the plaintiffs to produce specific facts on which an inference can be drawn that they'd prevail, and therefore they would be entitled to proceed.

QUESTION: Well --

MR. BRANSON: So a libel plaintiff should not be permitted, as any other plaintiff should not be permitted to proceed past summary judgment when a statement --

QUESTION: Is that another error -- is that another way you say that the Court of Appeals erred in this case?

MR. BRANSON: The Court of Appeals did not say

that.

QUESTION: What did it say?

MR. BRANSON: The Court of Appeals said that because libel -- excuse me, because summary judgment is a threshold issue, it's unfair to make plaintiffs marshal all of their evidence at the summary judgment stage --

QUESTION: I agree.

MR. BRANSON: And secondly, it said that because state of mind is at issue, it's inappropriate to apply the clear and convincing standard because otherwise we would have summary judgment granted, is the inference that you draw from the Court of Appeals' reasoning there.

QUESTION: You don't think there are any -- any of the statements that the Court of Appeals said should go to trial, that any of them involved real credibility questions?

MR. BRANSON: No, I don't, Your Honor, and for example, if we take the issue of Mr. Eringer, and I think it is appropriate to deal with that question --

QUESTION: That's Allegation 11?

MR. BRANSON: There are six allegations of the nine remaining that are attributable to Mr. Eringer as the source, one of which is 11. The Court of Appeals

dealt with Mr. Eringer on two different issues. One of them relates to the procedural question that I've already addressed, the threshold issue, and the other dealt with the substantive question of actual malice and the evidence in the record of actual malice.

The Court of Appeals said that Mr. Eringer is not in the United States and therefore is not available for deposition, and since the Court of Appeals said that this is a threshold inquiry, we should give the plaintiff an additional opportunity to somehow deal with Mr. Eringer. Now, of course, we believe that that's fundamentally in error. The Federal Rules of Discovery do not stop at the borders of the United States. If the plaintiffs had wanted to depose Mr. Eringer, there was a procedure to do it, notwithstanding the fact that he is resident in the United Kingdom, and they never suggested to the district court they had any desire to depose Mr. Eringer.

So the threshold reason for using Mr. Eringer as a reason for denying summary judgment here we don't believe is sufficient.

On the merits, the Court of Appeals used language that makes it clear that their analysis of the Bermant who was the author of this article, and Eringer, who was the source for these six articles, is an

analysis based on negligence. Indeed, the Court of Appeals uses the words "standard of care," and that is the language of negligence. The Court of Appeals says that Mr. Bermant did not look Mr. Eringer in the eye. He couldn't therefore have reliably, reasonably assessed his credibility. That's the language of negligence.

And finally, the Court of Appeals said Mr. Bermant did not check Mr. Eringer's sources himself, and a failure to investigate, we have been told time and again by this Court and others, is the language of negligence.

So the Court of Appeals has said that this issue must go to a jury because the plaintiffs have put in facts, specific facts, Mr. Bermant did not check his sources, Mr. Eringer's sources, that give raise to an inference only of negligence, and that's constitutionally insufficient to sustain the jury's verdict. But it is admissible evidence on the question of actual malice.

And so by adopting the rationale of the Court of Appeals and diminishing the standard that the plaintiff has to meet on summary judgment, the plaintiff now has some evidence that is admissible on the question of actual malice. It's not sufficient, and this court would have to find on a Bose review, if a judgment was

entered on this evidence, that it was not constitutionally sufficient, and therefore reverse the judgment, but this plaintiff gets to go to trial because they have evidence of mere negligence.

QUESTION: Mr. Branson, in fraud actions brought in state courts, frequently the burden of proof is said to be by clear and convincing evidence, actions to set aside a will, that sort of thing.

Have there been state court decisions as to what standard applies for summary judgment in these cases?

MR. BRANSON: Yes, Your Honor, there have, and we readily admit that there are state court decisions from the state supreme courts that disagree with the rule we are stating. There are indeed federal court decisions, one that I know in a libel case, in the Westmoreland v. CBS where the trial court in New York stated a different rule than we are arguing here today.

It is a question of policy.

QUESTION: Are there any, are there any holdings, any holdings supporting your position?

MR. BRANSON: Yes, there are, Your Honor. The Court of Appeals notes that its view is not the view of the Second Circuit, and so there is a conflict on this question, and we don't suggest that this Court has ruled

on it either. What we are saying is that a matter of sound judicial policy and correct application of Rule 56, it is right to say that libel plaintiffs must produce the same quantum of evidence at a motion for summary judgment that they need produced to get to a jury.

QUESTION: You say also, don't you, that the Court ought to consider the statement and the Chief Justice's opinion in Hutchinson v. Proxmire in the light of the Bose case?

MR. BRANSON: We have suggested in our brief, Your Honor, this. If the footnote in Hutchinson, which of course has been repeated by this Court in Calder, suggests that there is a rule against summary judgment in public figure libel casese, then that ought to be reconsidered in the Bose, light of the Bose determination. However, we believe that the proper reading of the rule -- not of the rule, of the dicta announced in the Hutchinson footnote is that it calls for a neutral application of the summary rules, and indeed, they should be neutral. And we can make that point in two ways. First, when this Court first enunciated that dicta in Poller and stated that state of mind does not readily lend itself to summary judgment, many of the lower courts began to state that there was a

rule against summary judgment in antitrust cases where state of mind was at issue.

And therefore this Court in National -- First National Bank of Arizona versus Cities Service, set the record clear and said there is no such rule. The facts of each particular case, the Court said, in Cities Service, must be examined so that we can deterine whether a trial is needed, and the Court there upheld a grant of summary judgment in an antitrust conspiracy case, making the point to the lower courts that there is no rule against granting summary judgment in the right case.

Now, before the Hutchinson footnote, lower courts had been saying there is a rule favoring summary judgment in public figure libel cases, and we believe that the Chief Justice in the footnote in Hutchinson simply corrected that view by stating there is no rule, and we believe that what the Court said in Cities Service applies to this kind of a case as well. Each case must be dealt with on its own facts, and where a libel plaintiff in response to a motion for summary judgment can produce specific facts on which an inference can be properly drawn that there is clear and convincing evidence of actual malice, they are entitled to go past the motion and to get to the --

QUESTION: So in libel cases, neither a judge nor a jury is really entitled to just disbelieve a witness if there's no contrary evidence?

MR. BRANSON: He's not entitled to disbelieve a witness if there's no -- well, in the Bose case, the Court --

QUESTION: Well, is that right or not?

I mean, the other side is, I take it, you say the other side has to come up with some concrete evidence --

MR. BRANSON: It's not -- it is --

QUESTION: -- before the witness may be disbelieved. Is that right?

MR. BRANSON: What the Court is permitted -- what the Court is permitted to do under Bose is to accept a trial court determination that a witness is not credible and yet notwithstanding that admission, assess the record and determine whether there is competent evidence by a clear and convincing standard of actual malice because the author in the Bose case was deemed by that trial court not to have been credible. And this Court in Bose said we understand that, and we take that point, but notwithstanding that finding, there's still in that record --

QUESTION: The defendant gets on the stand, or

say it's a reporter gets on the stand and says I just didn't know that that was false, I had no reason to believe -- and the judge says I -- writes an opinion and says I just don't believe him, or the jury says I just don't believe him, and yet the other side didn't come up with any concrete evidence.

MR. BRANSON: That case would have to be reviewed under Bose by an assessment of the totality of the evidence to determine whether there were sufficient grounds to find that that reporter in fact entertained --

QUESTION: But you wouldn't -- but you would -- wouldn't you have to take the judge's or the jury's judgment that this fellow was just incredible?

MR. BRANSON: Well, you might have go take --

QUESTION: And you just put his testimony aside, right?

MR. BRANSON: We may put his testimony aside, but what the Court said in Bose was that that doesn't provide a basis for the plaintiff to prevail. The plaintiff must have evidence, its own evidence, that there is sufficient grounds to find actual malice by the clear and convincing standard, and I submit in this case, for example, what the plaintiff is saying, the Respondent here is saying to you, is that it may be that Charles Bermant, if he takes the witness stand, will be

disbelieved, but that's not enough on which one can get past the motion for summary judgment --

QUESTION: But that's not enough under any standard.

MR. BRANSON: Absolutely.

QUESTION: I mean, you don't have to go to a clear and convincing standard to say that failure -- disbelief of a party upon whom the burden of proof is isn't enough to support the burden of proof of the other side.

MR. BRANSON: That's precisely our point. We agree with that entirely.

What we say is that on this record there is no specific fact on which a reasonable juror could draw an inference that there was actual malice by the clear and convincing standard.

QUESTION: But the Court of Appeals does -- well, but your -- if you're relying on the point you just made, you should be able to make your case without the clear and convincing standard on review of summary judgment.

MR. BRANSON: Why is that?

QUESTION: Well, if the whole thing turns on whether or not the disbelief of a -- of your reporter would support an inference, an affirmative inference for

them, that fails under the normal summary judgment standard as well as the clear and convincing standard.

MR. BRANSON: I agree. I misspoke. I thought I was responding to a question, and I must have confused the two.

We believe that the Court of Appeals has discussed evidence, we accept that it has discussed evidence, the relationship of Bermant to Eringer, which is evidence in the record from which someone could draw a reasonable inference of negligence, and what the Court of Appeals is saying, that that evidence is sufficient to get the plaintiff to a jury in the hopes that somehow at trial they will somehow add to that evidence and provide clear and convincing evidence of actual malice.

So I don't mean to say that the only thing at issue here is the credibility of the reporter. The Court of Appeals has identified some evidence which would be admissible on the question of actual malice. The question for the trial court in these cases, when that happens, is whether in assessing that evidence it believes that it reaches the clear and convincing standard of constitutional malice, not simply negligence that we have here.

QUESTION: Well, do you agree that in this case, do you agree with the Court of Appeals that there

was enough under the normal standard of summary judgment to support its ruling?

MR. BRANSON: No, I don't because the Court of Appeals uses the language that a reasonable jury could find actual malice on the following facts, and then it discusses Eringer in the manner that we have discussed him. They have not, the Court of Appeals has not said that it is applying the standard we argue for, the clear and convincing standard. Had he done that, we believe that he would have had to -- the Court of Appeals would have had to have concluded that there is not sufficient evidence to --

QUESTION: But how -- what if you're wrong? What about on a preponderance? I thought --

QUESTION: Yes, the -- what --

MR. BRANSON: Well, on a -- well, on a preponderance, the plaintiff would fail as well because even on a preponderance, evidence of negligence is not evidence of actual malice, plain and simple.

QUESTION: The fact that the Court of Appeals, in your view, relied on negligence, is insufficient regardless of what summary judgment standard you apply.

MR. BRANSON: It should be, unless you adopt the view that if the plaintiff puts some evidence in the record that is admissible on the case, he puts some fact

in dispute.

QUESTION: But that --

MR. BRANSON: That's the, that's the holding of the Court of Appeals.

QUESTION: Well, but that isn't correct even under summary judgment rules in a number of other areas of the law that don't have anything to do with clear and convincing. You can't say that the plaintiff hasn't produced enough yet to go to the jury but he might by the time we come to trial.

MR. BRANSON: Well, but the Court of Appeals has said that this evidence of negligence could give a jury grounds for finding actual malice. I disagree with that assessment of the evidence, but that is what the Court of Appeals said. I disagree because I believe that that is evidence of mere negligence, and under no standard is evidence of mere negligence ever sufficient to find constitutional malice.

But it is admissible evidence, and there may be some case, the courts have told us, when the evidence of negligence is so overwhelming that it somehow transcends into the subjective standard of constitutional malice.

So the Court of Appeals, I believe, is suggesting that there's enough evidence of negligence in

this case to make that transcendance, and I disagree with that assessment, but it doesn't mean the Court of Appeals has been inconsistent in that regard.

QUESTION: Which of the nine allegations that the circuit court said should go to trial do you think would have been prohibited or would have been resolved by summary judgment under a clear and convincing standard?

MR. BRANSON: Well, Your Honor, we believe all of them would, and that's the holding of the district court. We believe the district court made the proper assessment of the entire record, the totality of the evidence, and concluded that on the clear and convincing standard this case should not go to trial.

QUESTION: You take the position that the summary judgment standard should be the same as that applied on a motion for directed verdict?

MR. BRANSON: That is correct, Your Honor.

QUESTION: Is it clear from decisions of this Court that on a motion for directed verdict that the clear and convincing standard would be applied?

MR. BRANSON: In an actual malice libel case?

Your Honor, the Court applied the clear and convincing standard in Time, Inc. v. Pape, which came to this Court from a directed verdict granted on the

defendant's motion by the trial court, a reversal by the Seventh Circuit, and this Court in turn reversed saying that the plaintiff in that case had not met its burden of producing clear and convincing evidence. That is the only case that I know of where the Court has dealt with a directed verdict case in a public figure libel case.

QUESTION: What case were you refering to?

MR. BRANSON: Time, Inc. v. Pape.

QUESTION: Well, I take it the Court of Appeals agrees with you, that at the directed verdict stae the clear and convincing standard applies.

MR. BRANSON: That is correct, Your Honor. The Court of Appeals does not say that that is not the rule.

QUESTION: It says it is.

MR. BRANSON: I'm sorry, I said -- I made a double negative. Excuse me. Yes, the Court of Appeals agrees that at the directed verdict stage, clear and convincing evidence has to be produced. It is only at the summary judgment stage, because of the reasons we've articulated, that the Court of Appeals believed that the plaintiff should be freed of that burden.

Mr. Chief Justice, I am going to reserve some of my time for rebuttal. I would like then to conclude if there are no further questions.

CHIEF JUSTICE BURGER: Very well.

MR. BRANSON: We believe Rule 56 has a clear purpose, and the purpose is to end litigation that should not proceed to trial. It is a valuable tool of judicial management, and it is intended to prevent the wastage of a court's time and of the litigants' time. And this case illustrates the validity of that purpose.

Our motion to summary judgment before the district court was based on a record that is before you in this volume of the appendix. We briefed the question between the parties in less than 60 pages. The counsel for the parties appeared before the district court for less than one hour in this case. We therefore consumed less than one hour in the entire proceeding of the court's public time.

And the court granted a motion for summary judgment which gave effect to Rule 1, a speedy, just and inexpensive termination of this case.

But if we have to try this case it will take four to eight weeks because we will not only have to examine the questions of actual malice that have been developed before the district court to date, we will have to deal with the question of truth and falsity. We will have to deal with the question of defamation

itself. We will have to deal with the question of damages, and indeed, we have been sued for $22 million.

Four to eight weeks of trial time, of the district court's time and of our time on a case that to date the Court of Appeals and the district court are in agreement, the trial judge will have to grant a directed verdict.

That does not give effect to Rule 56.

Thank you.

CHIEF JUSTICE BURGER: Mr. Lane?

ORAL ARGUMENT OF MARK LANE, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. LANE: Mr. Chief Justice, and may it please the Court:

A reading of the Petitioner's brief and reply brief asserts in essence that the Respondents called for the abolition of all summary judgment in public figure libel cases because of considerations mandated by New York Times, that is, the question of the mental processes of the author and the defendant. That does not represent our position.

We support the position here taken by the Court of Appeals which did grant -- did agree with the district court that in 21 of the allegatons of defamation it was appropriate to grant summary

judgment. We agree with that conclusion. We also agree with the Court of Appeals that in the nine where they did -- where the Court of Appeals did not agree with the district court, that the Court of Appeals was correct.

All summary judgment cases and libel cases -- summary judgment motions in libel cases need not be denied because of questions of credibility. For example, the court held in this case, the district court held, and the Court of Appeals agreed, that there were some allegations which were basically opinion, which is, of course, protected. They held that there were reliable sources. They held that some material had been previously published in a responsible and reputable publication. We do not quarrel with any of those findings.

But when we come to that which is left, we get to the question of weighing the evidence and determining the credibility of witnesses. For example, Mr. Branson has discussed many of the reasons given by the Court of Appeals for holding that Mr. Bringer is not a source who can be considered reliable on a motion for summary judgment, except Mr. Branson left out what I consider to be the single most important argument offered by the Court of Appeals, and that is Mr. Anderson, the publisher of the defendant, testified at the deposition,

when asked if Mr. Eringer was reliable, I don't know. I don't care. It doesn't matter whether he's reliable or not; he's not a source. But he turned out to be the sole and exclusive source for five of the defamatory statements.

So that it seems to us that the standard mandated by New York Times, talking thereafter, in its progeny, about reckless disregard, are spelled out by the defendant stating I don't care; I don't -- it makes no difference to me whether he's reliable, and then relying upon him.

This Court in St. Amant talked about the apocryphal telephone call. The Court of Appeals has said in this case this is something like the apocryphal telephone call coming into being. But the other matters are even stronger in terms, I believe, in terms of a need for a trial, the matters which Mr. Branson did not discuss, for example --

QUESTION: Are you arguing that no matter what standard that you apply here on summary judgment, that you should win? Is that your argument now?

MR. LANE: That is true, but also we would go further and say that the clear and convincing standard should not be applied here at this level, and the difference, if I may say, Your Honor, between a directed

verdict and summary judgment, it's not the amount of time the plaintiff has to conduct discovery, it is the difference between cross examination in the presence of the person or the trier of the fact. That is crucial. As Wigmore has said, and as this Court has quoted with approval, the greatest engine ever dicovered for the determination of truth is cross examination, and that does not contemplate cross examination in a desert, but cross examination before the trier of the facts, or at least before the court to make the decision. As the Court has said in bose, which is a case cited by the Petitioners in this case, the Court has said in Bose it is true there can be a determination, but this Court said in Bose that is because the entire record is there, no discovery, not affidavits, the record is there, and the demeanor of the witnesses, the crucial witnesses, was observed by the Court, and that is what is lacking here, no matter how long the discovery period is.

QUESTION: But if there's an actual conflict in the evidence, you don't resolve it at either summary judgment or --

MR. LANE: Or directed verdict.

QUESTION: Yes.

MR. LANE: Yes, that is our position.

QUESTION: But I suppose you could just

disregard a defendant's witness that you didn't believe, and if you believed him, you might hold for the defendant, if you didn't, you wouldn't.

MR. LANE: That is correct, but in order to believe or not believe, you must hear, you must see him.

QUESTION: But you couldn't do that on summary judgment.

MR. LANE: That is correct, Your Honor.

The other two areas where the Court said there is defamation, possible defamation which should be determined by the jury, was one where the editor of the publication himself testified that he said this is a -- he said to Mr. Anderson, the defendant, this is a terrible article. This is a ridiculous article. This article should not be published, and about one of the acts of defamation, the editor of the defendant publication said this could be libelous.

QUESTION: Well, Mr. Lane, let me go back a minute to where you responded to Justice White's question.

MR. LANE: Yes, Your Honor.

QUESTION: If the presence of the judge's ability to judge credibility by seeing the witness personally is so important in the clear and convincing

test, how can an appellate court ever say that there was not clear and convincing evidence here if a trial court has found otherwise.

MR. LANE: This is the independent review mandated by New York Times v. Sullivan, and that is it is an independent review based upon the entire record, the determination by the jury, the determination by the court. The entire record is there including the determination of the trial court.

QUESTION: But the witnesses aren't.

MR. LANE: That is correct, but at least the appellate court has the advantage of the view of the jury or/and the view of the trial court in reaching its conclusion, something totally absent here.

We have heard that this is a two-stage, a two-trial procedure. First we -- plaintiffs must try the case before the judge, convince the court, but what do we have to convince the court of? We have to covince the court, according to this theory, as not only what is in the mind of the witness, the publisher, the author of the defamation, and whether, how his mind was affected by malice or lack of malice.

But according to this standard, the court must then guess as to what the jury, not yet chosen, would guess as to what the witness who has never been seen,

but more than that is that the whole process -- it is not a two-trial system, it is a no-trial system once that motion for summary judgment is granted, because no one who has made a determination has seen a record, and no one has seen the witness.

One other area where the Court of Appeals acted and said the matter should be tried was in reference to -- and this is slightly complicated but I think extremely important -- a man named Mr. Spear and a man named Mr. Trento, while working for Jack Anderson wrote, and it was published in True Magazine, a totally defamatory article about the plaintiff in this case. The plaintiff filed a lawsuit against True Magazine and its publisher, Fawcett, named Spear and Trento as well, but did not serve them.

The True Magazine, Fawcett Publishers, then settled the case according to the demands of the plaintiff, paying them a substantial sum of money, and publishing an entirely compensatory article. Subsequent to that, Mr. Spear became an editor of the defendant publication, The Investigator, took and utilized that in assisting the person who wrote the article, Mr. Bermant, gave him the exact information which had been published previously. Mr. Bermant then secured a copy of True Magazine which contained such defamation that True

itself had settled the case to the favor of the plaintiff, and republished the same defamation yet again in The Investigator, and some of those allegations of defamation, previously published defamatory material, survived. And those are some of the matters the Court of Appeals said should be tried .

This is in essence, I believe, a classic case. Of course, it is possible to conjure up with a fertile imagination a case, if this one is to be dismissed on summary judgment, it is possible to conjure up a case, I'm sure, which would be stronger than this one. But the elements here are very, very strong. This Court had the apocryphal telephone call in St. Amant. Here we have the real person, Mr. Eringer, never even seen by the author of the article, about whom the defendant Mr. Anderson said we don't care about his reliability, it makes no difference at all, and Mr. Eringer was never asked what's the basis for anything that you said. He was never asked that question. That is the record.

In addition to that, we have the testimony of the editor --

QUESTION: Mr. Lane, am I correct in, as I listen to your argument, and listening to your opponent, you are in effect saying that the evidence already in

the record is adequate to meet the clear and convincing standard.

MR. LANE: I am saying that that is true, but that is not --

QUESTION: He is saying the evidence in the record is insufficient to meet the preponderance standard.

MR. LANE: Yes, that's correct.

QUESTION: So both of you seem to say it really doesn't make much difference what standard we apply if we look at the correct part of the record.

MR. LANE: I think it is very important not just in this case but for other cases that the standard that be applied is not clear and convincing at this stage, at the summary judgment stage. One can go --

QUESTION: But you are primarily interested in this case, I assume.

MR. LANE: Yes.

QUESTION: Not a lot of other cases.

MR. LANE: Yes, yes. We are concerned with this one.

QUESTION: Well, the Court of Appeals seemed to -- the Court of Appeals seemed to think it was important because it carefully applied only the non-clear and convincing standard in reviewing the

record.

MR. LANE: That is correct, but the Court did not distinguish and did not say what it would have done if there was clear and convincing. It said that was not the proper standard.

QUESTION: If we disagree, if we disagree with you, perhaps we ought to find out what the Court of Appeals would think.

MR. LANE: Well, I think it's clear what the Court said. I think it's clear that the Court said that the clear and convincing standard should not be applied.

QUESTION: Oh, yes.

So what if we hold it was wrong on that? We shouldn't, we shouldn't review these nine allegations, should we, under the clear and convincing?

MR. LANE: No.

QUESTION: Wouldn't we ask the Court of Appeals?

MR. LANE: I think that the clear and convincing standard should not be the standard.

QUESTION: Oh, I know, but suppose we disagree with you?

MR. LANE: Well --

QUESTION: Then we remand, don't we? We

don't --

MR. LANE: That's correct.

The reason I, if I may say, that I believe the clear and convincing standard should not be applied at this level is one can make the analogy which the Court of Appeals did to a criminal case where the standard of probable cause is sufficient to have a person arrested, have him deprived of liberty for days, many days on occasion, and yet at the trial level it is there that the standard of beyond a reasonable doubt comes into play.

And so here, at the -- at this threshold level, absent a full record, absent an opportunity for the plaintiff witnesses to testify and for the trier of fact to judge credibility by seeing the demeanor of the witnesses, prior to that the standard cannot be clear and convincing.

QUESTION: I must confess I have some, some difficulty understanding that argument because I think, as Justice Rehnquist pointed out earlier, do we not asume for purposes of -- or doesn't the trial judge in evaluating the motion assume that all of your witnesses are telling the truth and draw all inferences favorable to your side of the case in evaluating the testimony?

MR. LANE: The trial court should.

QUESTION: So how can credibility help you any? You assume they are totally credible.

MR. LANE: The trial court should but did not in this case, Your Honor. The trial court did not --

QUESTION: But that doesn't go to the standard of proof.

MR. LANE: I beg your pardon?

QUESTION: That doesn't go to the question of standard of proof.

MR. LANE: No, but the trial court did not do that in this case, and the reason the trial court did not do that is because of Mr. Bermant, on behalf of the defendants, came in with a massive self-serving statement which we have seen in libel cases, and that is the allegation of I am pure, I am pure of heart. There was no malice at all in my heart, and here is this long document which had many citations from reputable sources and never mentioned, for example, in the affidavit, never mentioned Spear or True as a source, never mentioned it, but the appendix which was attached thereto, when analyzed, reveals that True was the exclusive source for a number of the libels.

I believe the Court read this long affidavit. There were citations about what the New York Times and what the Washington Post and others had said, and had

not made an analysis as to the delineated analysis which the Court of Appeals made as to each question.

QUESTION: Well, that's what Hutchinson v. Proxmire was talking about in that statement, wasn't it, that --

MR. LANE: Yes.

QUESTION: -- a defendant can't just come in with a long, self-serving statement about how great he is and how truthful he is and expect that to stand up on summary judgment if there is contrary evidence.

MR. LANE: That is correct, Your Honor, and I think that Bose takes that further when Bose says that this can be reviewed, but it must be reviewed after the record has been established, after the record, which is a record of cross examination. Those of us who have tried cases, all of us know that there is a substantial difference between testimony given during a deposition in a lawyer's office, cups of coffee, people smoking cigarettes, the witness being flanked by his attorneys, objections made, instructions not to answer questions, and the crucible of cross examination in front of the trier of fact. That is where the record is made. One year of discovery, ten years of discovery are not equal to 15 minutes in the witness chair before the trier of fact. That is what Wigmore teaches us. That is what

this Court has said on numerous occasions.

And what, may I ask, is --

QUESTION: Yes, but let me ask you again, do you contend that the cross examination will do something other than prove that the witness is totally a complete liar?

Say in summary judgment you just say, well, assume that that witness is a liar, what more can cross examination bring out? Are you saying that you will bring out affirmative evidence through cross examination?

MR. LANE: In this particular case, Your Honor, I think that the standard, any standard applied would have prevented the Court from having dismissed on those kind of questions.

QUESTION: My question is directed at the argument that there's something special about credibility of witnesses --

MR. LANE: Yes.

QUESTION: -- as a reason for having a different standard of proof on summary judgment, to which an answer is made, well, what difference does it make? You assume that the lawyer -- all the witnesses on one side are telling the truth and all the others are lying --

MR. LANE: But the Court should --

QUESTION: You then say what's left, is that enough to raise an issue, and I don't understand the cross examination argument.

MR. LANE: If the Court is asking are all the inferences to be taken to favor the nonmoving party, yes, of course, but they were not taken in this case, as I have stated.

QUESTION: Right, but you have argued, well, you didn't have an opportunity to cross examine in front of the trier of fact, and I'm saying, well, if you did have that opportunity you could perhaps prove that the witness is a total liar, but don't you assume that on summary judgment? So what is the point of your argument --

MR. LANE: Yes.

QUESTION: -- about needing to cross examine. That's what I --

MR. LANE: Well, we are drawing the distinction, for example, between summary judgment and a judgment notwithstanding the verdict which follows, or in the case of Bose, for example, which follows an entire record being made. We say, as you said, Your Honor, that on summary judgment the test should be that all inferences favoring the nonmoving party should be

taken. They were not taken in this case.

On the other side, if I might say, we hear raised the question of the chilling effect upon the news media if they are forced to go to trial. I must say that I have seen enough of the gigantic conglomerates which are in the business of publishing information about sports, entertainment and some news, enough to see of them that they are not easily chilled, they are often clothed so strongly in their own arrogance that they could, I believe, go through the ice age without having their body temperature lowered.

But if one is concerned about that and the chilling effect that one is concerned about is the massive verdicts, yet, on the other hand, is the First Amendment right of the plaintiff to speak out and the chilling effect upon an unpopular dissenting plaintiff who wishes to speak out and who wishes, if malice is utilized in attacking and destroying his reputation, to at least avail himself of his First Amendment and Second Amendment rights to have this question adjudicated before a jury.

Now --

QUESTION: What is the plaintiff's First Amendment right to have this issue adjudicated before a jury?

MR. LANE: No, the First Amendment right is to speak out, offer a dissenting view.

QUESTION: I thought you said there was a First Amendment right to have it tried and decided by a jury.

MR. LANE: If so, I misspoke, Your Honor. what I meant was the First Amendment right to speak out and the Seventh Amendment right to have the case tried, and the chilling effect upon dissenters, in this case the plaintiff, Respondent, is in fact a newspaper, which is an unusual circumstance perhaps, but the chilling effect upon this plaintiff as a publisher or upon any plaintiff is a matter which should also be of concern, and the way to handle that, I believe --

QUESTION: Well, after reading this record, one might truthfully say a chill on both your houses.

MR. LANE: I believe that the -- all of the concerns, the legitimate concerns of the news media having a great deal of room within which to make error, even without adequate investigation, all of those concerns have been addressed by New York Times and all the progeny, including Hutchinson and the most recent case Bose, but I think that those concerns can be addressed by -- not by abrogating the ordinary rules regarding summary judgment, but by after trial, after

the full record has been made, after the plaintiff has had an opportunity to vindicate himself -- money is important to many plaintiffs when they bring actions, but to many of us, to many of those who are not plaintiffs, and even to some plaintiffs, the right to vindicate one's position is of great consequence, in some cases of greater consequence.

If the plaintiff can have his position vindicated, if the concern of the chilling effect upon the news media can then be addressed, I suggest by a judgment notwithstanding the verdict, where something can be done about any damages, excessive or otherwise, which have been awarded by the jury; in that fashion the chilling effect can be addressed, if there is one, although I have never seen this apocryphal chilling effect documented over the years, but if it exists, it can be dealt with certainly by that independent review, and at the same time, the First Amendment rights of the plaintiff may be protected by permitting him to speak out and his Seventh Amendment rights protected by permitting him to have a trial before the jury.

The case, in conclusions, the case here rests upon the allegation by the petitioners that my client is not entitled to try, to go to a jury, to try a case where part of the case is based exclusively upon

allegations which were previously published and found to be defamatory, and then republished. Part of the case which exists is based upon the allegation by the editor of the defendant publication that this publication, this caricature, this cartoon, could be libelous and should not be published, and they published it. And part of it is based upon the look-alike of the St. Amant apocryphal figure come to life with the defendant having stated about him, we don't know if he's reliable, we don't care if he's reliable, it does not matter. That is reckless disregard.

And I say it is possible to conjure up another case where a plaintiff in a public figure libel matter can have a case tried if this one is not, but it does require, I believe, a fertile imagination.

Thank you.

CHIEF JUSTICE BURGER: Mr. Branson, you have three minutes remaining.

ORAL ARGUMENT OF DAVID J. BRANSON, ESQ.

ON BEHALF OF THE PETITIONERS -- Rebuttal

MR. BRANSON: Mr. Chief Justice, and may it please the Court:

I would like in my time to respond to two questions, one from Mr. Justice Stevens. He asked, does it make a difference what standard we apply at summary

judgment? And the answer is twofold. As the Court said in that Addington v. Texas, we are not engaged in a semantic application of words; we are engaged in setting values, First Amendment values and the values of Rule 56.

And with regard to this case, we particularly take the Court of Appeals at its word. Had they applied the clear and convincing standard, we believe the Court of Appeals would have found for the defendants and have sustained the judgment of the district court.

And therefore I respond next to Mr. Justice White's question who suggested that the proper course, should you apply the clear and convincing standard, is to remand to the circuit court for its determination of the record. I suggest to you that the jurisprudence of this Court demonstrates that you have yourself made those determinations in these cases, with one exception, and that exception was Firestone, and that case was remanded for this reason. The Firestone case had been tried in the courts in Florida on a strict liability theory, and this court held that the negligence theory announced in Gertz had to be applied to that case. Therefore, the plaintiffs had made no record in the trial court on negligence, and it would have been impossible for this Court to assess the record in that case.

But in all the other cases where the record has been complete, this Court has made the assessment, and while you could remand it --

QUESTION: Yes, but we have normally had a judgment of a court on the right standard, haven't we?

MR. BRANSON: You normally, Your Honor, have had a record made according to the right standard --

QUESTION: Yes, yes.

MR. BRANSON: With the exception of New York Times, where that case was tried on the strict liability theory, and you applied the clear and convincing standard, the actual malice standard, and you made the assessment and did not send that case back to Alabama for a trial in the Alabama courts.

QUESTION: Well, what you say has some virtue, I suppose. to say a particular standard should be applied for one court and tell another court to apply it can be a pretty abstract proposition. It may be better to have the court which is deciding which standard to apply to say what it means by applying the standard to the facts of that case.

MR. BRANSON: If you apply the clear and convincing standrd to summary judgment, I well agree with that, Your Honor.

We rest. Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

We will hear arguments next in Philadelphia Newspapers v. Hepps.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION.

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1602 - JACK ANDERSON, ET AL., Petitioners V. LIBERTY LOBBY, INC., AND WILLIS A. CARTO

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)