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COURT OF APPEALS

STATE OF NEW YORK

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DAVIS, ET AL.,

Appellants,

-against-

No. 145

BOEHEIM, ET AL.,

Respondents.

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20 Eagle Street  
Albany, New York 12207  
September 09, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: And we're going to  
2 start with number 145, Davis v. Bonheim (sic).

3 Counsel, do you want any rebuttal time?

4 MS. WANG: Yes, please, Your Honor. Three  
5 minutes?

6 CHIEF JUDGE LIPPMAN: Three minutes, sure.  
7 You've got it. Go ahead.

8 MS. WANG: Thank you. Your Honor, may it  
9 please the court, Mariann Wang for plaintiffs Bobby  
10 Davis and Michael Lang.

11 Given the pre-answer posture of this case,  
12 this court's clear precedent requires reinstatement  
13 of our client's defamation claim. Defendant Jim  
14 Boeheim, marshaled selective and distorted facts to  
15 prove his ultimate statements on - - -

16 CHIEF JUDGE LIPPMAN: Is it opinion or  
17 fact? What did he say.

18 MS. WANG: It is fact, Your Honor. He said  
19 repeatedly, that my clients had lied about being  
20 sexually abused - - -

21 CHIEF JUDGE LIPPMAN: Is it mixed opinion,  
22 or is it opinion - - -

23 MS. WANG: It --I submit - - -

24 CHIEF JUDGE LIPPMAN: --or is it fact - - -

25 MS. WANG: --Your Honor, it is both. It is

1 --the ultimate statements that we are suing under,  
2 which are in the complaint, are themselves statements  
3 of fact. He clearly stated our clients were lying  
4 about being sexually abused and had sought money  
5 before and were seeking money now, and they were  
6 fabricating statements for - - -

7 CHIEF JUDGE LIPPMAN: What about --what  
8 about taking --taking it in context? One of the  
9 arguments here is --is what was the situation? How  
10 does --how does it all play into the whole Sandusky  
11 thing and Penn State, and the kind of volatile  
12 atmosphere? What does that --putting that context  
13 around the statements, what does it say to you as to  
14 - - -

15 MS. WANG: Your Honor, the --this court's  
16 clear precedent states that the immediate context or  
17 the --the reports in which the statements appear, and  
18 the broader social context, includes the traditions  
19 and norms behind that particular forum. The  
20 statements here in this --the immediate context, were  
21 news articles. And - - -

22 CHIEF JUDGE LIPPMAN: Yeah, yeah, but  
23 that's --but my question to you is, in particular,  
24 the Sandusky business with the scandal at Penn State,  
25 how does that play into the ambiance in which Bonheim

1 (sic) made these statements? What do you draw from  
2 that?

3 MS. WANG: Your Honor, a reasonable reader  
4 would draw that to the extent that Boeheim was coming  
5 out and that the --the Sandusky scandal is the  
6 background, that he is coming forward with factual  
7 statements that distinguish himself from --from - - -

8 JUDGE GRAFFEO: Can you - - -

9 MS. WANG: --Joe Paterno.

10 JUDGE GRAFFEO: --can you elaborate why you  
11 said those two categories are factual statements?  
12 How --how are they - - -

13 MS. WANG: A statement that is clear and  
14 precise in meaning and that is provably true or false  
15 - - -

16 JUDGE GRAFFEO: I guess that's - - -

17 MS. WANG: --in other words - - -

18 JUDGE GRAFFEO: --what I'm asking. Tell --  
19 tell me --elaborate how they're provable?

20 MS. WANG: That my clients were sexually  
21 abused as children by --by Bernie Fine? That is a  
22 provable statement that is true or false.

23 Similarly, whether or not my clients had  
24 ever sought money for this --this statement which he  
25 says is a false statement. For instance, he stated

1 they're using - - -

2 JUDGE GRAFFEO: How is that - - -

3 MS. WANG: --ESPN to get money.

4 JUDGE GRAFFEO: --I think that's my  
5 question.

6 MS. WANG: Okay.

7 JUDGE GRAFFEO: The motivation issue that  
8 he commented on.

9 MS. WANG: Right.

10 JUDGE GRAFFEO: How is that fact and not  
11 opinion?

12 MS. WANG: That is --again, it's a provably  
13 --provable statement of whether or not my clients had  
14 ever sought money for their story, their statement,  
15 that they had been sexually abused. He - - -

16 JUDGE SMITH: Well, but - - -

17 MS. WANG: --clearly - - -

18 JUDGE SMITH: --whether they were hoping  
19 for money it obviously involved some surmise or  
20 hypothesis, doesn't it?

21 MS. WANG: It does. Although when you look  
22 at the plain language of what he said, he --he said  
23 specifically, "The Penn State thing came out before,  
24 and the kid behind this is trying to get money. He's  
25 tried before, and now he's trying again."

1 CHIEF JUDGE LIPPMAN: Counselor, why isn't  
2 this a very normal situation where someone who's in  
3 the sports context, where you have a coach who had  
4 someone he's worked with for many years, is accused  
5 of some terrible misdeed, and in the emotion of the  
6 moment, the superior defends his second-in-command,  
7 or whatever his role was? Why isn't this a very  
8 understandable kind of reaction? And again, taking  
9 it in context in the --just what was going on and all  
10 that was happening at that time, why wouldn't it be -  
11 --why wouldn't one view it as --as just a typical kind  
12 of instant reaction to the situation and defending  
13 someone who you know well and has worked with you for  
14 so many years. What brings it beyond that point?

15 MS. WANG: Well, Your Honor - - -

16 JUDGE READ: To follow up on that, why  
17 wouldn't a reasonable reader come to that conclusion?

18 MS. WANG: Your Honor, because of the  
19 number of facts that Boenheim put forth that were  
20 distorted and that implied his further knowledge on -  
21 --further knowledge that the wider public would not  
22 have. So in other words, he didn't - - -

23 JUDGE READ: What were - - -

24 MS. WANG: --just state - - -

25 JUDGE READ: --what were the facts based on

1 the further knowledge - - -

2 MS. WANG: That - - -

3 JUDGE READ: --the public did not have?

4 MS. WANG: --for example, he stated, not  
5 only that he knew Bernie Fine but that he knew Bobby  
6 Davis. I know this kid. He was around all the time.  
7 That he knew that the university had fully  
8 investigated and that he knew the fullness and  
9 thoroughness of that - - -

10 JUDGE GRAFFEO: Well, since he knew there  
11 had been an investigation that had apparently  
12 determined it was un --unfounded --whether that's  
13 true or not, we're not commenting on --but why  
14 wouldn't a reasonable reader just interpret this as a  
15 coach of a major university defending his school and  
16 worried about his football program?

17 MS. WANG: Because he went beyond that,  
18 Your Honor. He could have come forward and said a  
19 million things that were not defamatory, including a  
20 simple statement - - -

21 CHIEF JUDGE LIPPMAN: You said that he says  
22 I know the kid? Is that what you're saying - - -

23 MS. WANG: Part - - -

24 CHIEF JUDGE LIPPMAN: --what distinguishes  
25 it? And he says I know Bobby or Johnny or whatever

1 the name is - - -

2 MS. WANG: That is --that is - - -

3 CHIEF JUDGE LIPPMAN: --is that the main  
4 thing?

5 MS. WANG: That is one of the reasons - - -

6 CHIEF JUDGE LIPPMAN: What --what things  
7 distinguished it from the basic situation that I  
8 think we're all alluding to --what specifically are  
9 the really worst things he said that take it out of  
10 that normal defending your colleague or the school  
11 program, in this case, a very high profile basketball  
12 program known nationally? What distinguishes it?

13 MS. WANG: Your Honor, it is that he  
14 injected himself and stated affirmatively that I know  
15 all the parties, that I was present for these facts,  
16 that I knew that the investigation was full. Not  
17 just that it occurred - - -

18 JUDGE SMITH: He doesn't - - -

19 MS. WANG: --but further than that.

20 JUDGE SMITH: --he obviously doesn't claim  
21 that he was watching all the time and saw that no  
22 sexual abuse occurred.

23 MS. WANG: No, he's - - -

24 JUDGE SMITH: No one would understand that.

25 MS. WANG: Absolutely. He says - - -

1                   JUDGE SMITH: But suppose he had said I  
2 know Bernie Fine and I know he's incapable of doing  
3 this, and therefore I think the accusations are  
4 untrue? Could he --is that libel?

5                   MS. WANG: Your Honor, if he had just said  
6 that, only those statements, I believe we'd have a  
7 much harder case. And I think - - -

8                   JUDGE SMITH: How --

9                   MS. WANG: --and I think it would be more  
10 difficult - - -

11                  JUDGE SMITH: --I guess my question, then,  
12 is, why does a reasonable reader get a different  
13 effect from what he in fact said than from my little  
14 paraphrase?

15                  MS. WANG: Because of all of the facts that  
16 he marshaled, and that we submit on this pre-motion  
17 motion to dismiss, were false and dis --grossly  
18 distorted facts that Bobby Davis had come forward  
19 with just four names and we spoke to everyone he  
20 spoke to.

21                  If he had just presented any of those  
22 statement ac --accurately, it could have impacted a  
23 reasonable reader's conclusion. If he had said, you  
24 know what, we did an investigation, but he gave us  
25 more than a dozen names. We only spoke to four.

1           Actually one corroborated that Bobby Davis had  
2           reported the sexual abuse, all of those things would  
3           have affected a reasonable reader's conclusions.

4                        JUDGE READ:   But what's the best case.  
5           What do you consider to be our - - -

6                        MS. WANG:   Silsdorf v. Levine, Your Honor,  
7           is directly on point.  It is from this court, and it  
8           is exactly the same situation as we have here, where  
9           the plaintiff came forward and stated that his --that  
10          the defendants had called him corrupt, and then on a  
11          motion to dismiss, the plaintiff put in a lengthy  
12          affidavit that averred and assailed nearly every  
13          supporting example for why he was corrupt.  And by  
14          averring and pointing out all of those supporting  
15          facts as being distortions, inaccurate, those were  
16          all - - -

17                       JUDGE GRAFFEO:  But that case was in 1983,  
18          and our Mann case is much more current.

19                       MS. WANG:   Yes, Your Honor.

20                       JUDGE GRAFFEO:  Do you fit within the Mann  
21          analytical framework?

22                       MS. WANG:   Yes, it would, because Mann,  
23          first and foremost, was an op-ed, and on top of that,  
24          it was post-trial, summary judgment; we're here on a  
25          motion to dismiss.  And there was an introductory

1 note in that op-ed saying this is opinion. And  
2 specifically the statements that were being made in  
3 Mann were plainly and overly-abundantly exaggerating,  
4 talking about Marie Antoinette.

5 Your Honor, one other - - -

6 CHIEF JUDGE LIPPMAN: Okay --okay,  
7 counselor, you'll have your three minutes - - -

8 MS. WANG: --one other case.

9 CHIEF JUDGE LIPPMAN: --rebuttal.

10 MS. WANG: Okay.

11 CHIEF JUDGE LIPPMAN: Okay. Let's hear  
12 from your adversary.

13 MS. CANTWELL: Thank you.

14 THE COURT: Counsel?

15 MS. CANTWELL: May it please --may it  
16 please the court. I would agree that this case  
17 actually does not raise new issues for the court; it  
18 raises a new set of facts - - -

19 CHIEF JUDGE LIPPMAN: Counsel, this is 3211  
20 motion. Doesn't that set the framework for it in a  
21 little different than a summary judgment motion?

22 MS. CANTWELL: Your Honor, this court has  
23 repeatedly said - - -

24 CHIEF JUDGE LIPPMAN: Their burden is a  
25 little --a little less, right?

1 MS. CANTWELL: Your Honor, this court has  
2 repeatedly said that this particular question is a  
3 matter of law. What the reasonable reader could have  
4 interpreted from - - -

5 CHIEF JUDGE LIPPMAN: From the --from the  
6 complaint, do they have enough?

7 MS. CANTWELL: They do not, Your Honor.  
8 And - - -

9 CHIEF JUDGE LIPPMAN: Why not? What about  
10 this, when he says, I know this kid. I haven't seen  
11 this kid --this kid in his room. I know about that.  
12 You know, I know about the prior investigation.  
13 There --none of this was corroborated. Doesn't that  
14 go beyond the normal just defending your --your turf?

15 MS. CANTWELL: Not on these facts, Your  
16 Honor.

17 CHIEF JUDGE LIPPMAN: Why not?

18 MS. CANTWELL: At the same time that Jim  
19 Boeheim is having this emotional defensive reaction,  
20 the university put - - -

21 CHIEF JUDGE LIPPMAN: In the light of  
22 Sandusky and everything at Penn State.

23 MS. CANTWELL: Correct.

24 CHIEF JUDGE LIPPMAN: Why isn't it just  
25 what you just said, and understandable, emotional - -

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MS. CANTWELL: I submit that it is an  
understandable - - -

CHIEF JUDGE LIPPMAN: Right.

MS. CANTWELL: --emotional. But in  
addition, Your Honor - - -

CHIEF JUDGE LIPPMAN: No, no, but - - -

MS. CANTWELL: --the fact - - -

CHIEF JUDGE LIPPMAN: Yeah.

MS. CANTWELL: --the fact is that at the  
same time that Jim Boeheim is speaking on these two  
days, November 17th and November 18th, the university  
releases a statement; various media outlets - - -

CHIEF JUDGE LIPPMAN: Yeah, but he gave --  
he gave four different interviews on that day, right?

MS. CANTWELL: He --he - - -

CHIEF JUDGE LIPPMAN: This isn't something  
where --where an interviewer comes up to you on the  
spur of the moment and you give a --you give an  
answer. These were things that he had thought about  
what to say, we assume, and gave four different  
interviews. Doesn't that matter?

MS. CANTWELL: I'm not sure that's what the  
record would demonstrate, Your Honor, because - - -

CHIEF JUDGE LIPPMAN: What does the record

1 demonstrate?

2 MS. CANTWELL: That late on the evening of  
3 November 17th, the news broke. There's nothing in  
4 the record to suggest in any way that Boeheim  
5 injected himself into this, but rather the more  
6 reasonable interpretation is that reporters were  
7 calling him. He's the coach - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but if - - -

9 MS. CANTWELL: --of this --of this team - -  
10 -

11 CHIEF JUDGE LIPPMAN: --if you're having a  
12 --a single interview, and they call and you say,  
13 okay, I'll take it, and you give your viewpoint,  
14 maybe you haven't thought it through that much. On a  
15 day that you're talking about, in the aftermath of  
16 Penn State and these accusations now, about his  
17 trusted aide, you know, it's not something that you  
18 just --you know, saying off the top of your head,  
19 right?

20 MS. CANTWELL: It was, Your Honor. And --  
21 and because it wasn't just - - -

22 CHIEF JUDGE LIPPMAN: All of those  
23 different interviews?

24 MS. CANTWELL: Yes, Your Honor. And it  
25 wasn't just that he was defending his friend of



1 says, I know this kid.

2 MS. CANTWELL: He says he has a --he knows  
3 these people.

4 CHIEF JUDGE LIPPMAN: Isn't this --is - - -

5 MS. CANTWELL: I don't know think that  
6 knowing the people - - -

7 CHIEF JUDGE LIPPMAN: --isn't this on its  
8 face, mixed opinion?

9 MS. CANTWELL: We do not believe that this  
10 is mixed opinion. There are cases in this court - -  
11 -

12 JUDGE GRAFFEO: But he goes quite far in a  
13 lot of - - - a lot of his allegations about these - -  
14 - about Mr. Davis. I mean - - -

15 MS. CANTWELL: If you read what - - -

16 JUDGE GRAFFEO: - - - he says he was only  
17 there as a babysitter. He gets pretty particular in  
18 a lot of the comments that he - - - that he makes.

19 MS. CANTWELL: He states the basis for his  
20 knowledge; and overwhelmingly, the basis for his  
21 opinion, that they are lying is the fact that the  
22 university, the Post Standard and ESPN, three  
23 separate organizations, had investigated the same  
24 allegations, had interviewed the people that Bobby  
25 Davis put forward - - -

1 JUDGE GRAFFEO: But could have just said -  
2 - -

3 MS. CANTWELL: - - - and no one - - - - -  
4 and no one - - -

5 JUDGE GRAFFEO: - - - he could have just  
6 said - - -

7 MS. CANTWELL: - - - corroborated it.

8 JUDGE GRAFFEO: - - - that, and not gone as  
9 deeply into why he felt this young man was lying.

10 MS. CANTWELL: I think if you read the  
11 statements in totality, that's precisely what he is  
12 saying. He's upset. He uses hyperbole - - -

13 CHIEF JUDGE LIPPMAN: Yeah, but if you're  
14 upset - - -

15 MS. CANTWELL: - - - and tone - - -

16 CHIEF JUDGE LIPPMAN: - - - if you're  
17 upset, you can't distort the facts, totally, right,  
18 even though you're upset?

19 MS. CANTWELL: And he didn't, Your Honor.  
20 His - - -

21 JUDGE RIVERA: Okay, so - - - so, counselor  
22 - - - I'm sorry, but can you explain the statements,  
23 "The Penn State thing came out and the kid behind  
24 this is trying to get money," okay; "he's - - - he's  
25 tried before, and now he's trying again. If he gets

1 this, he's going to sue the university and Bernie."

2 MS. CANTWELL: I think what that - - -

3 JUDGE RIVERA: What - - - what does that  
4 mean?

5 MS. CANTWELL: First of all, it's classic  
6 opinion about the - - - the - - - Bobby Davis'  
7 motives.

8 JUDGE RIVERA: That he - - - he's trying to  
9 get money. That's his motive.

10 MS. CANTWELL: His motive.

11 JUDGE RIVERA: Okay - - -

12 MS. CANTWELL: So that's facts and opinion.

13 JUDGE RIVERA: But what about, "He's tried  
14 - - - tried it before and now he's trying again"?

15 MS. CANTWELL: I think in the heat of the  
16 moment, that's loose language, really referring to  
17 the fact that he's gone - - - Bobby Davis - - - to  
18 three separate organizations before. I don't think -  
19 - - and - - - and not gotten success. But - - -

20 CHIEF JUDGE LIPPMAN: Counselor, let me ask  
21 the same question I asked your adversary. How does  
22 the Sandusky thing cut in this situation that - - -  
23 that this happens in the wake of all of that? How  
24 does it - - - does it factor into what he did or  
25 didn't do, if at all?

1 MS. CANTWELL: A couple ways. It's in  
2 every article that's mentioned. So even the articles  
3 where they contend that Boeheim defamed the  
4 plaintiffs, Sandusky, Penn State, is mentioned. And  
5 the question on everyone's mind is what did Jim  
6 Boeheim know? Is he Joe Paterno? So that turns it  
7 into even more of a defense of himself and his co - -  
8 -

9 CHIEF JUDGE LIPPMAN: Should he be more  
10 careful or less careful in the wake of Sandusky, when  
11 he's doing these interviews? Would you think that he  
12 would be - - - it would make him tone down what he  
13 says, or it makes him more emotional, and he says  
14 things, maybe, he shouldn't say?

15 MS. CANTWELL: I think when Jim Boeheim - -  
16 - the reasonable reader would agree and be able to  
17 see from the articles, that if he's being accused of  
18 being Joe Paterno, turning a blind eye, that's really  
19 the gravamen of what he's saying. That's why he's  
20 saying I don't have any memory from twenty years ago,  
21 you know, something not necessarily susceptible to  
22 truth or falsity, because it's his memory from twenty  
23 years ago. I don't remember seeing this kid - - -

24 JUDGE ABDUS-SALAAM: So - - -

25 MS. CANTWELL: - - - in a bedroom.

1                   JUDGE ABDUS-SALAAM: - - - everything he  
2                   said - - - everything he said in every interview, in  
3                   your view, would be just opinion, not - - - there  
4                   aren't any real facts. He doesn't - - - you said he  
5                   doesn't know the facts?

6                   MS. CANTWELL: That's our - - -

7                   JUDGE ABDUS-SALAAM: That he's just saying  
8                   I really don't know the facts, it's just opinion.

9                   MS. CANTWELL: - - - that's our position.  
10                  Although I will note that the Fourth Department did  
11                  really lean heavily on Mann's third prong in saying  
12                  look - - - look at the context and everything  
13                  together. If there are a couple facts in here - - -  
14                  you know, the totality of circumstances would clue  
15                  the reader into the fact that this is his opinion.  
16                  It's an emotional debate. And that's really what the  
17                  Penn State thing comes down to - - -

18                  JUDGE RIVERA: But counsel, I want to go  
19                  back, please, about - - - this - - - this statement  
20                  about the money. And I understand your point that -  
21                  - - that these sentences are saying it's my opinion  
22                  that what motivates this accuser is money. I  
23                  understand that's your point.

24                  But I - - - he's saying, "He's tried this  
25                  before, and now he's trying it again." Doesn't that

1 mean that he's saying I know that he has tried to  
2 extort money in the past?

3 MS. CANTWELL: I don't think that's what he  
4 was trying to say. And I think this sort of hyper-  
5 technical parsing is what the cases - - -

6 JUDGE RIVERA: And how about the  
7 uncertainty about that not being enough on a motion  
8 to dismiss?

9 MS. CANTWELL: Well, in this case, Your  
10 Honor, what - - - what Boenheim - - - and again,  
11 you've got to read all the statements, because  
12 sometimes he says it a little bit differently than he  
13 does there - - - but I think the - - - the  
14 overwhelming gist of what he's saying is, this guy's  
15 come forward and no one has been able to corroborate  
16 him.

17 And it's not just the university, it's  
18 these other two press outlets - - -

19 CHIEF JUDGE LIPPMAN: Yeah, but isn't he -  
20 - -

21 MS. CANTWELL: - - - and they talk - - -  
22 I'm sorry, Your Honor - - - but they talk about going  
23 to everyone Bobby Davis sent them to, and no one can  
24 corroborate that.

25 CHIEF JUDGE LIPPMAN: Isn't that - - -

1 JUDGE RIVERA: Isn't - - - but isn't this  
2 suggesting that every time he's gone forward, he's  
3 sought money? And that makes a difference from every  
4 time - - - different from saying every time he's come  
5 forward, he's accused him without any corroboration?

6 MS. CANTWELL: I don't think that reading  
7 everything in its totality it is fair to pull out one  
8 little snippet from an emotional reaction. And  
9 obviously he wasn't going to get money from ESPN or -  
10 - -

11 CHIEF JUDGE LIPPMAN: Isn't he - - - isn't  
12 he - - -

13 MS. CANTWELL: - - - the Post Standard.

14 CHIEF JUDGE LIPPMAN: - - - clearly saying  
15 this is a false report of child abuse?

16 MS. CANTWELL: What he's saying, Your Honor  
17 - - -

18 THE COURT: Sexual abuse?

19 MS. CANTWELL: - - - is I know my friend  
20 Bernie Fine. I will stand by him till the day I die.  
21 Another indicator that this is emotional.

22 JUDGE SMITH: He is. He is - - - but - - -

23 MS. CANTWELL: This is his friend.

24 JUDGE SMITH: - - - to answer the Chief's  
25 question, of course he's saying it's a false report,

1           isn't he?

2                       MS. CANTWELL: Well, he's saying he doesn't  
3 believe it, Your Honor. Which is - - -

4                       JUDGE SMITH: He's - - - he's saying - - -  
5 there's a question of whether his saying it's a false  
6 report is fact or opinion.

7                       MS. CANTWELL: Well, what he says is, I  
8 don't believe it. And if someone can show me  
9 something, I'll reevaluate my opinion, is what he's -  
10 - -

11                      JUDGE GRAFFEO: With respect to - - -

12                      MS. CANTWELL: - - - says.

13                      JUDGE GRAFFEO: - - - your context  
14 analysis, if Bernie Fine had only been the assistant  
15 basketball coach for six months, would your argument  
16 be the same?

17                      MS. CANTWELL: We'd have a harder case,  
18 Your Honor. But I think the - - - the fact that he's  
19 his right-hand man - - -

20                      JUDGE GRAFFEO: Why does that make - - -  
21 why does the length of their friendship change the  
22 analysis?

23                      MS. CANTWELL: It's one of many factors.  
24 But I think it's part of what really turns up the  
25 emotion for Jim Boenheim and makes it so clear that -

1 - - the articles talk about him being vehement. They  
2 talk about him putting his heart over his head. The  
3 guy is having a very - - - he's also known as an  
4 emotional guy who's a blunt speaker. Again, one  
5 factor among many.

6 JUDGE SMITH: What about - - - what about  
7 the - - - I think we have a case called Thomas H. or  
8 some kind of name and initial. The - - - the - - -  
9 your - - - the your husband raped my child case?

10 MS. CANTWELL: Right.

11 THE COURT: Wasn't that an obviously  
12 emotional statement and obviously based on the most  
13 intimate relationship possible? She's saying that  
14 her own child says something that she believed in.  
15 Nevertheless, we found that that was a sufficient  
16 case of defamation.

17 MS. CANTWELL: That's correct, Your Honor.  
18 And that involved very specific fact-based  
19 allegations of a very, very serious crime, which the  
20 court noted in its opinion, made it different.

21 Here, there's no allegation by Boenheim that  
22 they're committing a crime. He's just simply saying  
23 he doesn't believe that his friend committed one.  
24 And I think Thomas H. is also a little different from  
25 this case, Your Honor, in that we know what Boenheim

1           said. And there was an aspect of that one - - -

2                   JUDGE SMITH: But isn't - - - isn't making  
3           up - - - isn't making up lies to get money out of  
4           people a crime? It ought to be.

5                   MS. CANTWELL: I - - - well, as a former  
6           State Prosecutor, I'm not sure I should answer that  
7           question. But it is true that there are - - - that  
8           one of the plaintiff's arguments is that, you know,  
9           it's - - - it's a crime to lie to the police. But I  
10          think the reasonable reader - - - in the trial court  
11          this argument was floated and the trial court  
12          rejected it, because the gist of what's going on here  
13          is he's not talking about them being criminals; he's  
14          saying they're motivated by money, and my friend, who  
15          I've known for a long time, I'm going to defend him  
16          and myself - - - I'm no Joe Paterno - - - till the  
17          day I die.

18                   CHIEF JUDGE LIPPMAN: It's so clear, that  
19          on a 3211 motion we throw it out?

20                   MS. CANTWELL: That's our position, yes,  
21          Your Honor.

22                   CHIEF JUDGE LIPPMAN: Okay, thanks,  
23          counselor.

24                   MS. CANTWELL: Thank you.

25                   CHIEF JUDGE LIPPMAN: Let's have rebuttal.

1 MS. WANG: Thank you, Your Honor. Justice  
2 Smith mentioned the case that I wanted to add at the  
3 end of my remarks - - -

4 CHIEF JUDGE LIPPMAN: Sure. Go ahead,  
5 counsel.

6 MS. WANG: - - - which was Thomas - - -  
7 which was Thomas H. This - - - this court has never  
8 held that being in a moment of - - - of either  
9 emotion or feeling defensive of someone that you care  
10 about or love, allows you to go and attack somebody  
11 and make false statements that are defamatory.

12 And, Your Honor, my esteemed opponent  
13 indicated that he - - - he had just mentioned that -  
14 - - that - - - and surmised that perhaps there was  
15 going to be a lawsuit. But that's, again, not what  
16 he said. He said it again and again. He also said,  
17 "They're using ESPN to get money. You want to put  
18 that on - - - on the air? Put that on the air."

19 He knew what he was doing. He was accusing  
20 our - - - our clients of extortion, and that's what a  
21 reasonable reader could have concluded. And in fact,  
22 in the record, at 280, a reasonable observer at the  
23 time noted that Boenheim was accusing our clients of  
24 extortion.

25 CHIEF JUDGE LIPPMAN: Do you give any

1           significance to the fact that there was a bunch of  
2           interviews rather than one?

3                       MS. WANG:  I - - - I give that - - - that  
4           significance in terms of the immediate context, which  
5           as Your Honor stated, he gave four different  
6           interviews.  My - - - my esteemed colleague indicated  
7           that that was not correct.  A fair and reasonable  
8           reading, and giving us inferences on a motion to  
9           dismiss, indicate that that is what happened.  That  
10          he issued a statement, and that in the record at 187,  
11          he said, by his own words, "I've talked to ESPN, to  
12          the New York Times, to you, the Post Standard, and  
13          I've issued my statement."

14                      JUDGE SMITH:  Isn't there a danger, if we  
15          go your way in this case, that we'll help to create a  
16          climate in which sup - - - a guy who sees an  
17          accusation, which he deeply believes to be false,  
18          against a close friend, has to keep his mouth shut,  
19          because his lawyers are going to tell - - - tell him  
20          he might get in trouble?

21                      MS. WANG:  Absolutely not, Your Honor.  
22          Your Honor, Jim Boenheim could have said many, many  
23          things.  He could have come forward immediately and  
24          said, I stand by Bernie Fine.  I've known him for  
25          forty years, and I just - - - this has to be

1 investigated; I don't believe it. If he had said  
2 that, I don't think we would be here. That's not  
3 what he said. He went much further. He - - -

4 JUDGE SMITH: "I don't believe it", and  
5 "they're lying", really come to the same thing, don't  
6 they? I mean - - -

7 MS. WANG: I - - - I would submit, Your  
8 Honor, that it is not the same as - - - as coming  
9 forward and saying repeatedly, they're lying, they -  
10 - - they're lying again and again. I know this kid,  
11 Bobby Davis. I know - - - he gave us four names - -  
12 -

13 CHIEF JUDGE LIPPMAN: Yeah, but don't you  
14 attach any significance to the emotional aspect of  
15 it, that he's not saying it in a political way. This  
16 guy is - - - is crazed about these accusations  
17 against his - - - his right-hand person.

18 MS. WANG: Your Honor, that - - -

19 CHIEF JUDGE LIPPMAN: That - - - that does  
20 matter. It can matter in looking at the context and  
21 making the ultimate determination as to - - -

22 MS. WANG: It - - - it could matter if we  
23 knew more - - - if we knew what the immediate context  
24 was.

25 CHIEF JUDGE LIPPMAN: You're saying at this

1 stage, we don't know enough.

2 MS. WANG: We don't know. We - - - we're  
3 surmising, and we're - - - we're guessing, because  
4 we're looking at what we - - - what a reasonable  
5 reader could surmise. And that is what a reasonable  
6 reader could surmise. They also could surmise that  
7 he came out immediately, on the same day that the  
8 ESPN report came out, to affirmatively make his case,  
9 factually, for how he's not Joe Paterno and how these  
10 - - - Bobby Davis and Michael Lang - - -

11 CHIEF JUDGE LIPPMAN: Thank - - -

12 MS. WANG: - - - are lying about being  
13 sexually abused.

14 CHIEF JUDGE LIPPMAN: Thanks, counsel.  
15 Thank you both.

16 MS. WANG: Thank you, Your Honor.

17 CHIEF JUDGE LIPPMAN: Appreciate it.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Davis, et al. v. Boenheim, et al., No. 145 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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