Superior Court of the Commonwealth of Massachusetts
County of Middlesex

Walter Tuvell 836 Main St. Reading, MA 01867 *Plaintiff, Pro Se* *v.* **Jack Marshall** 2707 Westminster Place Alexandria, VA 22305 *Defendant, Pro Se*	Case № 1781CV02701 **TRANSCRIPT OF ORAL ARGUMENT (ANNOTATED)**

INTRODUCTION

This document presents a **transcription** of the oral argument held on Jun 7 2018, together with **annotations (in endnotes)** thereto (with authors individually identified).

NOTATIONS

- **Comp** = Plaintiff's Complaint (Sep 13 2017).
- **Diss** = Defendant's Motion to Dismiss (Oct 16 2017).
- **Opp** = Plaintiff's Opposition to Diss (Oct 25 2017).
- **OppExhA** = Exhibit A to Opp (Oct 25 2017).
- *e* = Endnote (used for Annotations here).
- **Quote-marks** = Verbatim quotation or paraphrase. E.g.: "'marketplace of ideas'" at *Milkovich* ℘18 (see *e*19 *infra*) paraphrases O. W. Holmes.
- †, ‡ = Inline-notes (as opposed to footnotes or endnotes).

TRANSCRIPTION

Participants

- **Judge** Christopher K. **Barry-Smith.**
- **Plaintiff** Walter E. **Tuvell.**
- **Defendant** Jack A. **Marshall.**
- **Court Clerk** Arthur T. **DeGuglielmo.**

Court Clerk *00:05.4*

Plaintiff on the right please.

Parties and counsel identify themselves for the record.

Tuvell *00:11.0*

I am Walter Tuvell. I am the Plaintiff.

Marshall *00:14.3*

My name’s Jack Marshall. I am the Defendant, and also a Massachusetts attorney. I am representing myself *pro se*.

Judge *00:21.3*

All right.

And Mr. Tuvell, I take it you’re representing yourself.

Tuvell *00:24.8*

I am.

Judge *00:25:3*

All right. OK, so.

I have read the Complaint. I've read the moving papers. I'll hear from the moving party. I might have some questions. But at the outset I'll let you each say your piece.

I will tell you a couple — this probably goes, this probably is not surprising — but whatever else you'd like to say, I'd like to hear about two things.

The first is "opinion."[1] What's your positions are on what portions of these alleged defamatory statements, if any, are opinion, and therefore generally not actionable.

And the other issue is "the forum."[2] Whether it makes a difference what forum this occurs in. Reading the hornbook[3] I see that it has to discredit[4] the Plaintiff in a considerable and respectable class of the community.[5] This is a hypothetical question: if there was a forum that it was known that there was only two[6] members of, for instance, just to take an extreme example, that might really raise a question. If I heard that this particular forum is one where there's 10,000 known users, I'd push that issue to the side. But I think it's worth discussing.

But the bigger issue is "opinion." So I'll hear from you on all matters, but especially those two.

So the moving party can proceed.

Marshall *01:47.6*

Thank you, your honor. Good afternoon.

This episode came as a result of the fact that the Plaintiff, I think, had his feelings hurt[7] on an exchange on a*[n]* ethics blog that I have maintained for over nine years.

The defamation suit — I am making a motion to dismiss with prejudice. And a motion, if that is granted, to award costs.

There are four — I have four basic arguments. But in the interest of time, I will concentrate primarily on two.

The first is that the lawsuit was premature and unnecessary, and did not follow, it's — my understanding of Massachusetts procedure. I never received a demand letter, as I understand is required by Chapter 93A.[8] And that's more as a result — I was — indeed as a result, I did not even open the initial package I got from the Plaintiff, because it was not sent registered mail.[9] I did not even know it was a lawsuit. So I was totally surprised. And as a result I was behind the eight-ball. It came at a tough time.

And by the way I want to apologize to your honor, and also to the Plaintiff. There were — in reviewing my response — there were a lot of typos, and I'm a lousy typist, and a bad proofreader, and I apologize. I am usually better than that, and my — I hope you will grant that apology.

And I don't — that's not a mere technical flaw.[10] I have maintained a website and a blog for close to twenty years.[11] In that time I have had five

instances — I have written well over 9,000 posts — I have had five instances[12] where someone contacted me and claimed to be defamed or otherwise harmed by the post. In — prior to Mr. Tuvell — the other four, in two of them, I contacted the individual and took down the part of the post that upset them. In the fourth, I felt I was being basically bluffed and extorted by someone, refused to do it, and indeed they did not go forward. Had I received a demand letter, in all likelihood, we would not be here today. So that's a threshold issue.[13]

The other three is that — are that — all of the claims of libel — defamation — in the Plaintiff's Complaint, by all of my research, and what I knew about this prior — because I had done some work in this area — are not defamatory as a matter of fact of law.

Third, the Plaintiff not only didn't try to mitigate damages,[14] but actually put a link to my blog, where we had this exchange, on his own website, and discussed the matter on his own website, thus increasing whatever circulation[15] that he claimed whatever was harmful to him.

And finally that his claim of damages is not only speculative, but unsupportable.[16]

But let's — if we just focus on your main issue, which is "opinion," and whether any of these are in fact defamation. There are 33 separate instances of defamation in the Complaint.[17] According to *Lyons v. Globe Newspaper,*[18] which is a 1993 case, quoting a 1983 case, it says:

"To determine whether or not a statement is opinion, a court must ex-

amine the statement in its totality, and the context in which it was uttered or published. The court must consider all the words used, and must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement."

By that methodology, it would be hard to find a set of statements that had been more definitively stated as opinion.[19] First of all, my blog — both in the About section,[20] which is at the top of the page, and in the section that is guidance to commenters[21] — makes it clear — I state, it says right up front, that this is an opinion blog, that I am uttering my opinion, that it is out here for discussion purposes. So everything that is in there at least is covered by that.[22] And the Plaintiff said in the course of our discussion that he had in fact read the/this/these statements.

But, to the next level: In the primary post[23] — in which virtually, not quite all, but all of the, virtually all of the offending statements were made — I said at the beginning of it,[24] in that statement, I said: "Now this is an opinion, Walt, not an assertion of fact. You can't sue me."[25] I framed the entire thing that way.[26] That, underneath an overall, an overarching statement, officially taken by the blog: "All blog users, this is my opinion."

Now, of the 33, I can break, I've broke all of them down into five[27] different areas. And I'll do this quickly, I'm not going to run through all of the 33 individually, unless you want me to, I'll just give an example.

[#1] Five[28] of them had — were things that had nothing to do with libel

or defamation under any interpretation. Such as, I banned him from the blog, as a result of what I considered disruptive and insulting comments.[29] The Plaintiff argued that banning him from my blog, Ethics Alarms, was defamatory.[30] Nothing defamatory about telling somebody they can't comment on the blog anymore. That's simply an administrative act that I have every right to do. I have blocked probably 20–30 people over the nine years I've run the blog.

[#2] There are three[31] examples of statements, though likely false,[32] could not reasonably be considered offensive to the average person in the community. An example of that: Plaintiff claims that the post mistakenly referring to him as an "academic"[33] — a mistake I immediately apologized for — constituted an intentional slur and was defamatory. I am not aware — although I have my own opinions about academics — I'm not aware that that is a defamatory statement.[34]

[#3] Statements of opinion based upon disclosed facts.[35] Every statement made in this exchange was based on, either the Plaintiff's own website — which I included, had a link included — or his own statements. There were no undisclosed facts that anything was being based on. So, for example, here, there were, let's see, eleven[36] of those statements.

I said, characterizing his website: "The reason Walt is" — this is a quote — "The reason Walt is interested in judicial misconduct is that the judge decided his case was lousy."[37] That was my characterization and my belief.[38] And anyone who wanted to check it out, could check it out, and could dis-

agree with it if they chose.[39]

[#4] Uh, four, the fourth category is unrefuted statements of fact [40] — from *Yohe v. Nugent,* which is a 2003 case — do not provide a basis for defamation cause-of-action.[41] I said, in the course of banning Walt:[42] "This is the first time, however, that someone has abused Ethics Alarms for personal agenda."[43] I believe that is true,[44] and that is why he was banned.[45] The personal agenda had to do with the fact that he contacted me,[46] and said, "Why don't you ever write about Judicial Misconduct?"[47] I said, "I have."[48] I checked. I have maybe thirty–forty posts about judicial ethics.[49] I lecture on judicial ethics. I'm interested in judicial ethics.

As it turned out — and I was not aware of this,[50] as he came on — he has a website that, much of which is devoted to his own case that a Massachusetts judge — this would be Denise Jefferson Casper, United States District Judge of the United States District Court of the District of Massachusetts — engaged in judicial misconduct by dismissing his case.[51] When I found out that that had been the effort that he was, I felt slyly, trying to get me to give my opinion on without me knowing it,[52] I felt that I had been sandbagged. I said I had been sandbagged,[53] and I got angry.

One of the reasons I was angry is — you know, I teach legal ethics. In fact, I do part of the legal ethics introduction for the new admittees to the Massachusetts bar, every other month. Massachusetts is one of the jurisdictions that has Rule 8.2,[54] which makes it unethical for a lawyer to make a statement that the lawyer knows to be false, or with reckless disregard as to

its truth or falsity, concerning the qualifications or integrity of a judge or a magistrate. Now, if I had a website like Mr. Tuvell's, I believe that would be a violation of rule 8.2.[55] And I felt it would be, I felt that I would be, sort-of, tricked into giving opinions that would in fact enable this activity.[56] And so, yes, I did indeed get angry at that.

The fourth — so, I said this is the first time someone has abused Ethics Alarms for personal agenda — it *was* the first time.

[#5] Five — and there were seven[57] of these — I'm not proud of this. Insult, but/though an opinion, is not defamation. There were at least seven examples where I would confess to insulting Mr. Tuvell. In my comment guidelines,[58] I say there will be times that I sometimes will be unduly harsh with the commenter. Under those circumstances, the comm/people should call it to my attention, and I will often apologize or retract the statement. It's a free-wheeling blog. It's a forum for discussion. I moderate it carefully. But we discuss very, very emotional issues, on everything from abortion to war to Donald Trump. People get hot. People make accusations. And I — in an interest, frankly, in not censoring everything — I participate in the discussion. So, here, one of the seven insults was: "I have already spammed two more posts by the jerk." There is multiple cases in Massachusetts that basically state, characterizations such as "jerk" and others are not defamation. They're clearly opinion, and they are insult. That is, that's the law pretty much everywhere that I could find.[59]

[#6] And finally, inaccuracy.[60] The quote is: "Inaccuracy by itself does

not make a defamatory statement, or hold one up to contempt, hatred, scorn, or ridicule, or tend to impair a standing in the community." And there were three[61] episodes of those.

And that's the whole group.[62]

This is a debate forum. It is clear, it is stated up front, that it is a forum for free-wheeling opinion. The commenters frequently criticize each other, and they're often harsh with each other, although I do moderate it, to keep it from being abusive on the basis of race, religion, sexual orientation, gender, etc.[63] And sometimes, if I am sufficiently annoyed by — especially by accusations of bias, which is what I felt Mr. Tuvell was doing, over and over again — I may get harsh as well.[64] So I announced that I was banning him from the blog,[65] and you can see the offending paragraph, where I said, "And here's why," because I never ban anyone without explaining why.[66] That was the section in which I said, "Now, this is all my opinion, and analysis."[67] And I said that up-front.

So, that's — I don't even — I feel as if it's not really necessary to get into a lot of the attendant details, because literally the 33 case/instances of supposed defamation that are being claimed, by no set of law or research that I have done — and I handled another defamation case many years ago — could possibly qualify, I don't think, as defamation.

So on the basis of that, I'm asking for a dismissal.

Judge *14:52.9*

Just a couple questions. The Plaintiff attached to the Opposition, 34 pages of blog posts,[68] and my question is, is there an agreement that this is the entire scope? It appears to me to include everything. I'm just wondering if you've had a chance to review it. I'm wondering if I can categorize it as undisputed that the communications that we're talking about are this …

Marshall *15:17.9*

The various comments?

Judge *15:18.2*

… pages 1–34 that are attached to the defense. *[Indicating OppExhA.]* Have you had a chance to look at it?

Marshall *15:22.4*

I haven't, but I'll accept, I'll stipulate to that.

Judge *15:25.7*

Let me just take a short break and ask *[turning to Plaintiff]:* Is that what this is? Am I reading that correctly?

Tuvell *15:29.4*

Yes.

Judge. *15:29.5*

This is, sort-of, the whole string, as opposed to excerpts, or anything like that?

Tuvell *15:32.0*

It is indeed. It was — that blog post was started on a single[69] day; it continued into the next two or three days. All the contents are indeed right there in that Exhibit A, 32 or 34 pages that you are referring to. You ask if that's all there was to it. The short answer is — as opposed[70] to the bare facts — yes. As opposed to everything else we're arguing about here, obviously, much more[71] …

Judge *15:57.8*

Right. I'm going to give you a chance in one second.

I have one other question. And that's — this might be an academic question — I hesitate to use the term, but …

Marshall *16:04.3*

We're making law here, maybe. *[Joking.]*

Judge *16:05.5*

… academic question. What difference does it make: the forum?[72] When you set forth the rules — whether people read them or not — if a blog location sets forth rules, and generally speaking tell the users: "This is opinion.

It might get rough." However you put it. Does that matter in the defamation world? As opposed to — It sounds different than newspapers.[73] But tell me if you think it's — Is it as simple that, you said at the very beginning, and if *[we]* take all facts and circumstances into account, to determine if something is defamatory. Maybe it's that simple. I'm wondering, if there's any law that talks about when the ground rules are set by a particular forum, that it matters?[74]

Marshall *16:53.4*

I have not — I've researched it. Blogs, as you know, are making — this issue is sort-of a little bit of a gray area, because we're just getting, sort-of trying to decide what's going on here. However, the — I would argue that a forum that is laid out, specifically — you know, "No, you can't defame someone in court"[75] The same in an oral argument. The same thing applies to the blog. The blog is framed as: You enter this voluntarily; it's an opinion forum.

You have the option, by the way, on my blog, of having a screen-name, and keeping your own name out of the public,[76] if you so — as long as I know who it is. So this is why I have such an extensive set of disclaimers and explanations at the beginning of the blog, to make it clear that nobody comes here under any misconceptions.

So I think, Yes, I think the forum does matter.[77]

I chose not even to get into the issue, which is still a live one, about whether the degree to which various First Amendment protections[78] apply

to publications like my blog, which has had, I think nine — I just passed the 9,000,000 visitor mark, after nine years.

However, to address the question you asked previously: Since it's an ethics blog, it has a very narrow audience, and I can determine exactly — I can determine eventually (right now I have not been able to) — exactly how many people actually viewed this post.[79] And as of this moment, I know it is less than 400, probably close to 250, spread all over the usership of the blog, which is international. And, fewer than 25 people — I think fewer than 30 people — have actually commented. And I would presume that those who have commented on the blog are the ones who were most likely to have seen the exchange that the Plaintiff is complaining about. So we're talking about a tiny percentage[80] of people outside of the community, that might have in fact seen this, even if it were defamatory, which it is not.

Judge *19:19.1*

All right. Thank you.

Let me hear from the Plaintiff. And I'll say the same thing I said at the beginning: I'm happy to hear you on all matters. I'm particularly interested in your views with respect to opinion, and what we were just discussing about the forum, and whether it makes a difference. So.

Tuvell *19:35.7*

Thank you, your honor.

So, as to forum — let me just do that first, since it's hot on the floor

right now. He just said he's had more than 9,000,000 users.[81] He did indeed post that on his blog, in the last few days.[82] I saw it — I don't frequent his blog any more[83] — but 9,000,000 users, his actual language, he just now said, in open court, that says it's a pretty big blog. OK, so that's the end of that story, as far as *size* of forum goes.

As far as *composition* of forum goes — yeah. He's interested in people — interest is in ethics. He advertises it largely as legal ethics, but really he covers a lot more than just that. And his About page[84] specifically says nothing that he's going to focus on legal ethics. He does — you know, he's got a side business — I guess it's his main business actually, on legal ethics. This blog is separate from his business, by the way. He's got a different business called ProEthics.[85] That's a separate — it has a separate website, and it's a separate business from this blog we're talking about.

Continuing with the idea of composition of forum: I myself have a website. It's not a "blog" — you know, if we get into technicalities, of what's a "blog," what's a "forum,"[86] what — it is a website. And it's devoted to Judicial Misconduct. So, anyone who was seeing both of those *[websites]* would all of a sudden say — because of what he's saying there, about — falsehoods about my, what I will now call "vocation."[87] This is the main thing that I put my time into right now, my voca*[tion]* if you wish. I would be pleased if this court ruled me a limited-purpose public figure.[88] Because, I have that blog, I am associated to Judicial Misconduct research, and he has totally impugned that. OK, so there goes, you know, reputation damage.

So that's what I have to say, at the moment, about size of forum, and composition of forum.

Judge *21:44:7*

Alright.

Tuvell *21:45:6*

In particular, on his point that he just mentioned, quite recently, about his — I think it's his About, either his About page[89] or his rules page[90] or something — he talks about he's, it consists of his opinion. *Calling* something a "opinion" does not *make* it an opinion.[91] There is absolutely no rule that ever said that, in everything that has ever been printed, in every case, anywhere, in any jurisdiction. It says, to *call* something an "opinion," and then go ahead and make a statement of fact about it, does not *make* that an *[pure, fact-free]* opinion, period. So, we know that that's true.[92]

What *would* have made a difference, had he published it on his website, is if he would have said: "This website is a satirical one." Which means: "I'm going to actively say crazy stuff here, and I don't expect anyone to believe it."[93] OK. There are big arguments nowadays on the Internet about, you know, from various fact-checking websites — Snopes[94] and, you know, several others[95] — they say: "Yeah, we've heard on the Internet somebody saying such-and-such. But, guess what? That was first published on a satirical website. You can't believe anything they say." He *[Marshall]* did not say that. He does say he *believes* — on his About page, or whatever it was — he

believes everything he writes.[96] OK. Even though he says it's going to be "opinion," he explicitly writes, on that very same page, "I believe everything I write."[97] OK.

Now, that's what I have to say, a little bit, about opinion versus fact — I'm sorry, at least about *opinion*.

Now, as to *fact:* Obviously, in all — in my whole Complaint and everything else I've written here — I don't complain about his *[pure]* opinions, at all. Every single one of them is a fact problem. Now, he gave a list of 33, he claims — I haven't actually counted, maybe it is 33. I do have here a list[98] of five — what I would call the "five top defamations." And they are all *fact* based, not "opinion" based. And I'll read those in just a moment. Or, I could do it right now, but I just wanted to get that out.

That's what I say about fact versus opinion: I know the difference, I know the difference in defamation law in particular. Just to be clear here, we're talking libel. There have been once or twice that he talks about other types of defamation[99] — this is totally libel. So it's all written, as we just agreed to, or at least I just stipulated, the 34-page Appendix[100] you have there, I think covers 99% of everything.[101] OK.

I haven't — OK, there's two orders in which I could do things here. I could go down — I just said I have a list of five things here, and I could go down those, and I will in a moment. But what might be better is, since some of these ideas are hot on the floor, that he was just talking about, and I made notes[102] on them, let me briefly mention those.

Judge *24:39.4*

However you'd like to proceed.

Tuvell *24:40.6*

Thank you.

He mentioned something about a Chapter 93 demand letter.[103] That is ridiculous. That has to do with commercial law, consumer protection. This is not such a case. This is a straight defamation tort. I don't know where he's pulling that from. It's got zero substance with this court — with this case.[104]

Judge *24:59.7*

So, I'm not going to decide the Motion-to-Dismiss based on 93A demand letters, 'cause that's — 'cause it's a defamation lawsuit. So.

Tuvell *25:07.5*

Perfect.

He mentions registered — that I didn't send it registered mail.[105] There is no rule to send anything by registered mail in this jurisdiction. I did send it by U.S. certified mail, which is the accepted way to do it. I have[106] …

Judge *25:22.2*

Same thing, I'm not gonna rule on the motion based the form of mail either.

Tuvell *25:27.1*

OK.

Judge *25:27.6*

So that, this — the ruling in this case is likely to resolve — revolve around, yeah, the issues we were just discussing: opinion, …

Tuvell *25:37.8*

But he just put up …

Judge *25:38.4*

… defamation, damages,[107] that type of thing. Go ahead.

Tuvell *25:40.9*

I'm just saying he put it out on the floor, I need to mention these just to cover my position.

Judge *25:44.0*

Just lettin' you know.

Tuvell *25:45.6*

He mentioned mitigation of damages. That's also got nothing to do with this hearing. This hearing is a Rule 12.[108] It's got nothing to do with mitigation of damages.

Judge *25:55.7*

Well, you do have to allege damages, though. Have you done that?

Tuvell *25:57.8*

I absolutely have, sir. In my Complaint [109] …

Judge *26:02.9*

Damages to reputation — I think you have. I just wanted — I say that's the relevance to the Motion-to-Dismiss, you do have to allege damages.

Tuvell *29:09.1*

And I really appreciate the comment you just made. Because this is a Rule 12 hearing. So, what we're talking about here is whether or not I have alleged claims — you know, injury on which I can — on which a reasonable jury … Sorry, let's be careful here. We're asking whether or not there may reasonably exist evidence that what I claim could cause a reasonable jury to rule that I was defamed. OK. So all of his stuff that he's talking about — *facts* — have nothing to do with a Rule 12 hearing. It's whether I *pled* the facts. And I did. OK. Just want to make sure that that's understood here.

He said that the judge for — I don't know if you want to get here — the judge in this other case decided my case was "lousy."[110] That is false, because she did not decide on, quote, "my case." What she did is, she did indeed dismiss the case on Summary Judgment, but she falsely did so, because she did not listen to the Plaintiff's Statement of Facts. She explicitly

said, in her ruling where she dismissed the case, she said: “I am going to listen only to the Defendant’s Statement of Facts.”[111] The Defendant here was IBM, by the way, I was the Plaintiff, OK. That is illegal. That is Judicial Misconduct. That’s the basis of my Judicial Misconduct Complaints about that case. So when he said the Judge ruled that “my case” was “lousy,” that is false.

Judge

27:35.2

Let me ask a different about that, though. Because, just the use of the term “lousy,” has the ring of opinion.

Tuvell

28:06.4

It does indeed. Except for the fact that in this case, he was talking about, you know, my website claiming something — one thing — and then, he’s basically saying that I was false in what I was saying: I said that she ruled on a — he said that she ruled on my case — she ruled on a case that she invented the facts about.

So, it’s not “lou–” — You’re right, just the word “lou–” OK, insult. I have — I don’t — I have no problem with insults. He mentioned before he called me an asshole.[112] I don’t care about that. I don’t care about the word “lousy.” I don’t care of any it. None of those are in my Complaint. None of those are any of the 33 of my Complaint. What I do have in a number of places is to say things which may — how should I say it? In the language of Cardinal Richelieu, the famous Six Lines Aphorism.[113] So it may — if you ex-

tract them out of context — a few little words might look like an opinion. But in the context of everything, these things are not *[pure]* opinion. And in fact, the cases say — and the law reviews — all say what's really going on here is the contextual implication of defamation.[114] So if somebody says the case is "lousy" — the word "lousy" I don't care, that's nothing, it's a word. To say my whole case and my whole website "are lousy" — that is defamitorily impugning a whole set of facts over here, in context, that makes that "word 'lousy'" much more than "just the 'word' 'lousy'."[115] OK. All right. I have citations to all this in my filings.[116]

He says that he writes about Judicial Misconduct.[117] So, my website is called JudicialMisconduct.US. He says on his website, oh, he's talked about judicial misconduct thirty-some-odd times.[118] That is false. He has talked about Judicial Ethics in a few places, which is totally separate[119] from Judicial Misconduct. Judicial Misconduct is ruled by, you know, twenty years ago[120] …

Judge

30:14.9

This one jumps out at me as proving something false for the sake of proving something false.[121] If, in describing his own website, Mr. Marshall overstated the truth, "I wrote on judicial ethics thirty or forty times," and it turns out it's ten or twenty. OK. How does that hurt you? 'Cause all of this has to hurt you.

Tuvell *30:39.9*

Absolutely. He does not address Judicial Misconduct on his site one single time, insofar as I am able to find.

Judge *30:49.8*

Same question though. If he …

Tuvell *30:52.5*

Because he’s …

Judge *30:53.2*

… tells the world incorrectly how many times he’s written on the topic, how does that hurt you?

Tuvell *31:00.0*

Oh, I see what you’re saying. You’re right, it doesn’t. That, in itself, does not hurt me. His fact of saying here he wrote about it thirty-some-odd times, that doesn’t affect me at all, and I don’t care about that. What I do care about is that he’s pretending that what he’s written about applies to me, and it doesn’t. So he’s saying false things, which by context say that he’s — that what I write on my website is false, or in my lawsuit is false.

Judge *31:31.5*

OK.

Tuvell *31:32.1*

This is a fine point. I'm willing to drop the point. I admit, for him to say anything about, you know, how many millions of times he's written about Judicial Anything makes no difference. But just to point out that he doesn't know what he's talking about. What he's talking about is Judicial Ethics, which I, you know, am not interested in. I'm interested in, strictly,[122] Judicial Misconduct. You know, the whole Judicial Misconduct proceedings, through — in the case of the Federal Courts, which is what that case[123] is in — it goes through the Judicial Council, and the Judicial Conference, which is where I'm at right now. That is a known quantity. A lawyer should know that. Instead he pretends that writing about Judicial Ethics has something to do with the Judicial Misconduct proceedings. So …

Judge *32:22.0*

So let me just interrupt again. Because, when I go through the Complaint, to determine whether your allegations allege defamatory conduct, defamatory words, that — I'm going to put each one of the statements through a filter. And the last step of that filter is, "causes harm to you."[124] So, if you're talking about things that another person says, that then don't cause harm to you …

Tuvell *32:53.0*

Ah.

Judge *32:53.9*

… that's why I use term, it's like, proving things false for the sake of proving things false …

Tuvell *32:58.0*

OK.

Judge *32:58.1*

… the cause-of-action here is defamation. It's gotta hurt you.[125] So I just want you to know that I'm gonna have a bunch of things. It has to be false, not opinion, causes harm to you;[126] there might be a couple other things. But every — I'm gonna go through the Complaint, which is basically what the Defendant asks me to do — I'm gonna go through the Complaint, and I'm gonna put every, you know, set of allegations through those filters. And they have to satisfy all those standards. So I just say, the ones that happen — if you happen to be saying that he is misstating himself — unless it hurts you,[127] that's not actionable, unless I need to be educated on a different type of law.[128]

Tuvell *33:34.5*

Good. Now that you've explained there to me, I had time to think while you were saying that, and I can say, "Yes, indeed, it did harm me."[129] Because: on his website, you know, he is more-or-less God, let's just put it that way. So all of the readers there believe him.[130] Most of them are in his

pocket, they totally agree with everything he says. So, when he says — he writes about Judicial Misconduct, and he knows everything about it — then they're going to trust him when he goes back and says, "Oh, and Walt Tuvell's case is lousy." OK. That is defamatory implication in context.[131] OK. So I think that's the best I can say about that.[132]

Judge *34:16.5*

OK.

Tuvell *34:17.8*

Fine. I have mentioned — so that's what I have notes from what he said. I mentioned that I have a list of five …

Judge *34:28.2*

Yeah, well, I heard a category of five from Mr. Marshall. And I'll hear your category of five. And I'll see which one …

Tuvell *34:38.1*

It's a different five.

Judge *34:38.9*

OK — and I figured. So go ahead.

Tuvell *34:41.0*

Well, by "different five," I meant that he also talked about 33 claims of

injury in my Complaint. So I'm going to boil those down to five top runners. So, the five top defamations. Totally different from his point of five things.[133] OK. And so here they are.

[#1] First of all: theft of professional services.[134] Uh, accusations — so I didn't actually steal anything, because he never produced any professional services for me that I ever used. But he certainly accused me of attempting to steal professional services from him. He very specifically said that I was trying to get something for free off of him, and that in doing so I had a secret personal agenda, and that I was dishonest. That is a statement of fact. The statement of fact is: that I tried to get something free off of him that had value. That's a statement of fact, saying I'm a thief, or in this case just an attempted thief. That's not *[pure]* opinion. That is not an opinion. It is a statement of fact. Period. And we can look at the actual language.

Judge *35:51.7*

Is it opinion if he discloses the basis for his view? There's some case law that says: opinions based on disclosed facts, or non-defamatory facts — you can sort-of prove them to be opinion.

Tuvell *36:11.0*

You're absolutely right, provided that the facts that are based on this utterance — that we're debating, whether it's an opinion or fact, the basis of that — is true.[135] But it's not, in this case it's false. So, he says, "Walt did a bunch of stuff over here" — all of that happened to be false, factually false.

And then he said, “And that convinces me that he tried to steal, his theft of professional services.” OK. So, in that case, that answers your question. It was — this is the contextual imp– — defamatory implication in context.

Judge *36:48.8*

I want to hear your five categories. And I mention there’s a group waiting for a 3:00 o’clock hearing, that’s been very patient. So, I want to hear your five categories, and give you a couple more minutes.

Tuvell *36:58.9*

I’ll speed up.

Judge. *36:59.6*

Thanks.

Tuvell *36:59.9*

[#2] Number two. He said that I chose that — me, Walt, as opposed to anybody else on that website — chose the precise divisive issue or subthread of Left versus Right, and that my comments were “bitching” — his language there. That is false. Now, first of all, that is a statement of fact. That’s not opinion. That’s a statement of fact — except maybe the “bitching” comment, that’s just an insult, I don’t care about that. But to say that I’m the one that started the thread of all this stuff, that’s false. That’s not true. I wrote him on the side, before any of this website came up, a question about the purpose of his website, versus the About page or whatever — the design

purpose versus the implementation. That was separate. But on his website *per se,* I only ever said, “Look at my Judicial Misconduct complaints, that’s what I want to talk about.” And it was others on the website that picked that up and ran with it, and said, “Oh, he’s an academic, oh, he’s —” I guess they think academics are pro-left-wing, and/but the whole website is pro-right-wing, or something crazy. I didn’t start that. He li– It was false. It was a false statement of fact to say that I started that thread. Period.

[#3] Number three. He calls my website a single issue website. Now, in the context of everything written here *[indicating OppExhA],* what he means is the following. So I have a website. It’s called JudicialMisconduct.US. It is a “platform” — is the way they say it in the Internet nowadays — a platform or a framework for people to complain about Judicial Misconduct. He is saying that it’s not that at all. He explicitly said: “That’s not what Walt’s — Mr. Tuvell’s — website is about. It is instead about his particular case, *Tuvell v. IBM*.” That is false. So he made a statement of fact — that it’s a single-issue website — that is false. Right now there’s at least five cases on there,[136] and it goes into other stuff too.[137] But: statement of fact, false. He impugned the website, he impugned my integrity, of saying what I do now is really my vocation,[138] so to speak. OK.

[#4] Number four. Sandbagging. He claims that I had — that I said a certain thing — that misled him, and then I jumped — turned around and jumped — and said something different. It’s a little hard to tell, but that is totally false. By him saying that I said a certain thing that misled him — I

did not say that certain thing that he just got done saying that had misled him. OK. Totally false. The word “sandbagging” I don’t care about. But for him to say I — as he said in a number of places — that I secretly, dishonestly misled him about what I was interested in — that is false. The record proves it, those 34 pages.

[#5] Last. His banning me from his website, and saying that I was the first time anyone abused Ethics Alarms — that’s the name of his website — for my personal agenda. OK. I totally agree, he owns the website, he can ban anybody he wants. However, this is the perfect example of contextual defamatory implication. Yes, you can ban me. But to say that the reason you banned me is this — you know, my paragraph 14 there, with all of these points in there *[gesturing to copy of Complaint, ¶14℘7–15],* that’s what he was relying on — all those points were false. OK. The point being, so, why do I — since it’s already been talked about, that they’re false, why am I raising that the banning is a big deal? Because that’s the kiss of death on the Internet. And if you get banned from something, you’re automatically thought to be, “Oh, a terrible person.” Remember, all these people reading his website? 9,000,000 users, as he just said a few moments ago. OK. All of a sudden, that’s defaming me. Falsely. I did not do anything for personal agenda here. By “personal agenda,” by the way, he means this business about theft of professional services, in this context, just read it, that’s what is says. *My* personal agenda was: “Hey, Jack, this would be great for you to write about — Ethics Alarms, on your website — because here’s a judge ly-

ing about a case. She picked this case, at Summary Judgment, where by rule and by law, the judge has to credit — automatically credit, without thinking — the Plaintiff's Statement of Facts. Instead, she writes, in black and white: 'I am crediting the Defendant's Statement of Facts.'" That's something that a lawyer should care about.

Last point. He mentioned Mass. Rules of Professional Conduct 8A. I think he sh– — Er, 8, what is it called?

Marshall *42:06.2*

[Background voices, speakers unidentified.] It's 8.2.

Tuvell *42:11.4*

8.2, right. I think he should have quoted Mass. Rule of Professional Conduct 8.3. And I quote it right here (it's the last thing I'll say): "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question at to the judge's fitness for office — "office" here meaning being a judge — shall inform the appropriate authority."[139]

My proof of that is a little snippet out of her decision. I call it the Smoking Gun — it's published on my website, I pointed him explicitly to it — which proves that she explicitly said: "I, the judge, at Summary Judgment, am going to credit only the Defendant's Statement of Facts. Not the Plaintiff's."

8.3.

Judge *42:57.9*

All right.

Marshall *42:59.9*

Your honor.

Judge *43:00.3*

Mr. Marshall, if you want sixty seconds to respond, I'll give you sixty seconds.

Marshall *43:02.9*

Sixty seconds, all right, sixty seconds.

"A," I have had 9,000,000 users — views, not users. Users are much — I'm sorry, I apologize, my mistake *[speaking to the Clerk, who had gestured for him to stand up],* I was feeling faint *[joking]* — the users are much smaller than that. I have 2,000 people who officially follow my website every day.[140] So that is just, you know, that's just wrong.

Basically, I don't know how to — As far as I can see, that monologue basically supports what I've been saying. I mean, essentially what the Plaintiff is saying is, "Opinion is fact." Opinion's not fact. It's — opinion's not fact when anyone else is free to look[141] at all the evidence, every bit of evidence in which I said, "From what I saw of the website, this is a single-issue website." That's not a statement of fact. That's my analysis.[142]

Judge *43:53.4*

You would say that when you — one of the things about the Internet, where it's so easy to link to things, is that when you state what you say is an opinion, and then …

Marshall *44:03.6*

Link to the website.

Judge *44:03.6*

… link to the basis for that statement, it's almost free from being defamatory, because any reader can exercise their own mind to see if they agree with your statement or not.[143]

Marshall *44:18.7*

That's correct, they can come back and say, "He's wrong. He's full of bulljunk." But that's, nonetheless, it's still an opinion.

The stealing professional — basically, my statement was that I was brought into the Plaintiff's ambit by a suggestion that I — why don't I look into more Judicial Misconduct.[144] As a matter of fact, your honor, I think I've written more than forty or fifty[145] pieces about Judicial Ethics and Judicial Misconduct. And I don't — I have to say, I don't understand the argument that Judicial Misconduct and Judicial Ethics are completely different, at all.[146] I mean, you know, I teach this stuff. Judicial Misconduct is a breach of the canons. It's Judicial Ethics. I don't understand the argument.

And as far as the insults can — Every single item that I listed and rebutted in my Complaint — were taken directly off of the original Complaint. So, if — I don't know what Mr. Tuvell is talking about there.[147]

And that's more than my sixty seconds. I've done — I think it's pretty clear that these are all opinions being represented as fact.

Judge *45:31.8*

All right. So, I want to take the matter under advisement. These things usually take a week or two. And you should expect a decision from me in the next couple weeks. And I appreciate your arguments. You'll hear from me soon.

Marshall *45:45.5*

Thank you, your honor.

Tuvell *45:46.4*

Judge, would you entertain further business at this moment? It's not a lot. What it is, is he recently this week put in a motion for costs. I have an opposition to that. I have filed it downstairs earlier today.

Judge *46:01.7*

I'm gonna rule on costs on the papers. I don't need to hear argument on it.

Tuvell *46:08.2*

Fine.

Judge *46:08.5*

So if you submitted something, I will be sure to look at it before I make a decision.

Tuvell *43:13.3*

Fine.

The other thing I made a motion on, just today — motion with memo — is that I would like him to communicate by email with me. He has blocked me. He refuses to communicate by email. For example, I would like to have PDF copies of his filings, so I can do a search, and do an easy quote *[referring to "cut-and-paste"],* stuff like that. He refuses to give that to me. I've tried to give it to him, he refuses.

Judge *46:39.7*

So you've asked for that …

Tuvell *46:41.3*

I have indeed …

Judge *46:41.8*

… permission in your motion?

Tuvell *46:42.2*

… it’s a motion in your box.

Judge *46:42.8*

All right, I will consider it when it reaches my desk, which is usually a little while. OK.

Good. Thank you. And you should expect a decision in the next couple weeks.

Other than those motions you just mentioned that are already on file, typically while a motion-to-dismiss is pending, I don’t expect there to be other action in the case. So that, you get a decision on this motion first. OK.

Marshall *47:08.1*

Thank you, your honor.

Judge *47:09.2*

All right.

Tuvell *47:09.5*

I do understand that, but I wanted to cover my bases, because you just said “typically.” So I don’t think what you just said is a rule, and I don’t even know your particular operating style. That’s why I filed the motions.

Judge *47:19.6*

Yeah, I’m saying, the things that are already filed, that’s fine.

Tuvell *47:22.8*

OK.

Judge *47:23.1*

And now I’m saying, O– — So I’ll be more explicit. While the motion-to-dismiss is pending, other than the things that are already filed, I don’t want any discovery, or other motions in the case.

Tuvell *47:36.0*

Totally agree.

Thank you.

ENDNOTES/ANNOTATIONS

1 *[Tuvell]* We have much to say about "opinion" throughout these endnotes/annotations, but at a minimum here, we note the word/concept doesn't even occur at all in the "hornbook" definitions of cause-of-action for defamation: see *e*3 *infra*. It's a secondary/derived/after-invented concept.

2 *[Tuvell]* The Judge's use of the word "forum" is nonstandard in the law of defamation (to placate the Judge, the Defendant and Plaintiff at oral argument fall in line and use his nonstandard word "forum" too). But from context, we assume what he means is "audience," the standard terminology for the recipients of defamatory communications.

The Judge's concern here focuses on the *size* of the audience. Elsewhere in the Judge's questioning (see *e*5,72,143 *infra*), he has *other* concerns about the audience.

The Judge's concern about the *size* of the audience is wholly nonstandard/irrelevant (i.e., "false," in the sense of "bad faith," possibly/probably aiming to bamboozle/hoodwink/swindle the *pro se* Plaintiff, and "trigger" his PTSD, see *Note* at the bottom of this endnote/Annotation). For, as long as the size of the audience is ≥ 3 (namely, the Plaintiff, and Defendant, and at least one other audience member, which has indisputably occurred, namely, during this very oral argument, Defendant himself estimates "probably close to 250" people saw the defamation at the time of events, see ℘14), the size of the audience is simply *not* a factor as an element/criterion of a cause-of-action for defamation generally, much less *(a fortiori)* at Motion-to-Dismiss time (though it may be relevant in a damages discussion) — according to every "hornbook" (see *e*3 *infra*). And indeed, as the Defendant himself has already explicitly pointed out to the Court, Massachusetts law agrees with the hornbooks on this point (*Brauer v. Globe Newspaper Co.,* 351 Mass. 53, 217 N.E.2d 736 (1966); https://law.justia.com/cases/massachusetts/supreme-court/1966/351-mass-53-2.html), at Opp℘7¶2, which we repeat here (with direct quotation and enlargement, emphasis added, internal cites omitted): "There is *no requirement* in an action of libel 'that the defamatory matter be

communicated to a large or even substantial group of persons. It is enough that it is communicated to a *single individual* other than the one defamed.'"

Note: Even though the Judge's concern about size of the audience is totally bogus, the Defendant and Plaintiff were "obliged" (because judges can be bullies/abusers-of-power, noting that such bullyism/abuse-of-power is a/the major "trigger" for Tuvell's PTSD, which the Judge well knew Tuvell suffered from, because Marshall attacks it in OppExhA$_{\wp}$16, see *e*25 *infra*) to address it at this oral argument (and they did so).

3 *[Tuvell]* The Judge doesn't specify *which* "hornbook" he's referring to, which is OK (though it does indicate his general interest in "hornbooks"), because at this basic level it doesn't really matter (they all essentially agree on the fundamentals). (i) The "standard" "hornbook" is the *Restatement (Second) of Torts* (https://www.jstor.org/stable/25761080, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1016&context=faculty_scholarship), but it's now rather dated (http://wakeforestlawreview.com/2011/01/the-vast-domain-of-the-restatement-third-of-torts/). Up-to-date specialized treatises include: (ii) Sack's *Sack on Defamation* (we reference herein the 3rd edition, 10th release, Apr 2009 (the most recent available in the Middlesex Law Library)); (iii) Smolla's *Law of Defamation;* (iv) Collins' *The Law of Defamation and the Internet.*

For the record (since the Judge raised the point), we list here the *Restatement's* **standardized list of four elements/criteria of cause-of-action** for defamation/libel/slander reputational damage (as languaged here by *Sack* §2.1, but which can be found in the other "hornbooks" as well — **none of which mentions "opinion," which is an after-invention**):

(α) A false† and defamatory statement concerning another.

(β) An unprivileged publication to a third party.

(γ) Fault amounting at least to negligence on the part of the publisher.

(δ) Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

In Massachusetts, in all cases of libel (including "cyberlibel," as in the instant case), the first clause of (δ) obtains: that is, ***no* claim/proof of "spe-**

10 (not 19)

cial harm" is required (this is captured/summarized by the catch-phrase **"all libel is *per se*"**). This has already been explained at Comp℘17ƒ3 and Opp℘19ƒ15 (and crops up again at *e*143‡ *infra*); it's also mentioned in *Sack* §2.4.17 ("courts in [Massachusetts] presume that reputation harm flows from words that are actionable *per se*"), and again at §2.8.3 ("in Massachusetts, all libelous communications are libelous *per se,* and are actionable without proof of special damages" (paraphrased)).

{† • One must be very careful about the word "false" here, because in the law of defamation it doesn't mean "strict/rigid/logical" falsity, but rather "material falsity." See *e*18 *infra*.}

4 *[Tuvell]* The judge speaks falsely here. In the law of defamation, there is simply *no* requirement for "(actual) discredit" as an element of a cause-of-action for defamation generally, much less *(a fortiori)* at Motion-to-Dismiss time (though it may be relevant in a damages discussion). Instead, there is only a requirement for "*potential/tendency* to discredit." (Though, in the actual event, it is plainly clear that Marshall's defamations did indeed have a detectable/measurable deleterious effect on Tuvell's reputation, in the estimation of the blog's audience, as is immediately obvious from any casual perusal of OppExhA.) See *e*5 *infra.*

5 *[Tuvell]* In *Sack* §2.4.3, the "(potential) effect of communications on the audience," is discussed in these ways (emphasis added; notes and internal quotation marks omitted):

"The *Restatement* view is that it is enough that the communication would ***tend***† *to prejudice* [there being *no requirement* to consider whether prejudice *actually* occurred to any audience member] the plaintiff in the eyes of a substantial and respectable minority of the community as a whole." {† • "The focus on whether a communication would ***tend*** to injure the plaintiff's reputation, rather than whether it *did in fact* cause such injury, is [an oddity unique to defamation law, compared to other areas of tort law — because, damage/injury/harm to reputation is so difficult-to-impossible to detect/quantify, obviously]." *Sack* §2.4.1.}

"Although it has often been said that a communication is to be consid-

ered on the basis of its effect upon the 'average' person, it is the *nature of the audience for the particular statement* in issue that determines whether the speech is defamatory [rather than an 'average' member of the general population]."

"Communications are judged on the basis of the impact that they will *probably* have upon those who are likely to receive them, not necessarily the ordinary 'reasonable men.'"

"For a *specialized audience* [e.g., in the instant case-at-bar, the people following the discussion (OppExhA) are assumed to be somewhat acquainted/interested — though largely/wholly non-lawyers, and not-necessarily-well-educated in legal matters — in law and ethics, noting that Marshall calls it a "very narrow audience" on ℘14], the statement's defamatory meaning is to be judged by the average and ordinary reader acquainted with the parties and the subject matter."

"[T]he law is stated in terms of what the reader *might reasonably understand* the offending words to mean, [and not] what the author of the words *intended [or pretended]* them to mean [in particular, not whether the author tried to inoculate/immunize the audience/himself by proclaiming/pretending everything he wrote was 'pure/fact-free opinion,' see *e*72 *infra*]."

6 *[Tuvell]* The Judge's conjecture about "only two members" is an absurd/meaningless nullity, given that the filed papers/evidence (esp. OppExhA, which the Judge himself ostentatiously waved around at this oral hearing, *e*68) conclusively prove conclusively.

7 *[Tuvell]* Classic "damning by faint understatement." The elements/criteria of cause-of-action for defamation (listed in *e*3 *supra*) do not include anything like "the feelings of Plaintiff being hurt" (as Marshall of course knows well).

8 *[Tuvell]* MGL Pt.I Tit.XV 93A, specifically its provision for a demand letter, §9(3).

9 *[Tuvell]* "Registered mail" (which provides end-to-end security in locked containers; https://en.wikipedia.org/wiki/Registered_mail) is *not* required for service of a Complaint in Massachusetts (nor, probably, in any other jurisdic-

tion in the United States or world). Plaintiff used “certified mail,” with contemporaneously provided proof of such to the Court, as is fully compliant with the relevant court rules (esp. MRCP 4(e)(3)). Opp ℘9–10.

10 *[Tuvell]* It’s unclear here what “technical flaw” Marshall is referring to, though both candidates are entirely bogus, as argued/proven by Plaintiff already in his Opp (so it’s false for Marshall to keep beating those drums here at oral argument): (i) If he’s referring to “registered mail,” see *e*9 *supra.* (ii) If he’s referring to “demand letter,” see Opp℘9ƒ11 where it’s additionally noted that in any case Tuvell certainly *did in fact* send a “demand letter,” via email.

11 *[Tuvell]* But of course, whether the “twenty years” here or the “nine years” on ℘4,7,14 is the correct number, no such longevity measurement is remotely relevant/exculpatory for a charge of defamation. (… see *e*12 *infra*)

12 *[Tuvell]* (… see *e*11 *supra*) For example, the five instances mentioned here (and others unmentioned) may very well have been actionable for defamation.

13 *[Tuvell]* No, it’s not a “threshold issue” in the standard legal sense. Marshall here uses the phrase “threshold issue” in a colloquial sense (namely, claiming Defendant could/would have pacified Plaintiff, without the necessity of filing a formal lawsuit), not in the standard legal sense (where the phrase refers to a “punch list” of *legal* prerequisites that must be satisfied before further proceedings can be sustained).

14 *[Tuvell]* Mitigation of damages is irrelevant here. It’s simply *not* a factor (e.g., it’s not in any “hornbook”) as an *element of a cause-of-action* for defamation generally, much less *(a fortiori)* at Motion-to-Dismiss time (though it may be relevant in a *damages* discussion).

Besides which: What Marshall says is ridiculously false anyway, because the material posted on Tuvell’s own website reflects precisely his arguments in the instant lawsuit anyway (i.e., documenting the truth of events, and exposing Marshall’s defamation) — hence it *does* amount to “mitigation of damages” (it does *not* amount to “repeating/supporting the defamation”).

See also the criticism of the “mitigating damages” at Opp℘18–19.

15 *[Tuvell]* By speaking of “increased circulation,” Marshall here appears to be “agreeing” with the Judge’s focus on the “size of audience” issue, but as already explained in *e*2 *supra* that issue is an irrelevant non-sequitur in defamation cases generally, much less *(a fortiori)* at Motion-to-Dismiss time.

16 *[Tuvell]* But of course, there’s not need whatsoever to discuss damages here, because that’s irrelevant at Motion-to-Dismiss time.

17 *[Tuvell]* It’s not entirely clear where Marshall gets his count of “33 separate instances of defamation” from. That number doesn’t correspond, for example, to the number of pages or of paragraphs in the Comp. Marshall does *partially* explain where the count of 33 comes from, by the six sub-counts he mentions later (see *e*28,31,36,40,57,61 with sub-counts of 5+3+11+4{?}+7+3 = 33), but he doesn’t fully explain where he gets those sub-counts from.

In Comp, Plaintiff uses the symbol “†” ~57 times to tag “statements and actions complained-of” (Comp¶17), but not all of those indicate “separate/distinct instances of defamation” (there is some overlap/duplication). A *categorization* of the “Top Five Defamations” was given at oral argument (and hence recorded in this very transcription, see *e*133 *infra*). It seems inappropriate/tedious to provide here a “free-standing (that is, apart from the Comp itself) complete/exhaustive listing,” in the sense of a table explicitly mapping each of those ~57 occurrences to their corresponding “Top Five Defamations” (or other defamations not amongst the top five) — though, that exercise could readily/easily be accomplished.

18 *[Tuvell]* There are two (related) 1993 cases referred to as *“Lyons v. Globe Newspaper:”* (i) *“Lyons I,”* 415 Mass. 258 (http://masscases.com/cases/sjc/415/415mass258.html). (ii) *“Lyons II,”* 415 Mass. 274 (https://law.justia.com/cases/massachusetts/supreme-court/volumes/415/415mass274.html). Since Marshall speaks about “quoting a 1983 case,” he’s referring to *Lyons I,* where the language Marshall cites appears on ℘263, as follows (internal cites and quotation marks omitted, emphasis added):

“In order to receive protection under these principles, a challenged

statement first must qualify as an expression of opinion. If the statement **unambiguously constitutes** either fact or opinion, this issue is a question of law for the court to decide. The court must examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms [and, the "cautionary terms" published on Marshall's About page by no means suffice: they're only vague *labels,* not crisp *proofs,* of opinionatedness] used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published."

The problem, though, is that Marshall falsely omits (and the Judge falsely ignores) the crucial precondition of this quotation: *"If the statement **unambiguously constitutes** either fact or opinion, this issue is a question of law for the court to decide."* In the real world, many/most(/all) statements are of a ***mixed/intertwined** character* (*Sack* §4.3.2ƒ149.1: "Opinions implying facts are sometimes referred to as 'mixed opinions';" *Sack* §4.1: "Analysis is complicated because communications commonly consist of intertwined allegation of fact and opinion") — part fact, part opinion (and not "unambiguously only/pure fact or only/pure opinion"), and/or containing ***defamatory implication, a.k.a. defamation-by-implication/imputation/insinuation/innuendo*** (see esp. the hornbook quote from *Restatement (Second) of Torts* at the end of this endnote/Annotation; also see *Sack* §2.4.5 generally) — especially when taken *in context* (cf. the tag "CTXDEFIMPL" mentioned in *e*116 *infra*). For example, for an ignorant person to say "the moon is made of green cheese" (whether or not prefacing it with a "cautionary term," such as "I think," so that linguistic trickery/fakery doesn't count)[†] is a statement of *both* opinion and fact (in this example, a false fact). According to the terms promulgated by *Lyons I* (preceding paragraph *supra*), such mixed opinion/fact statements are *not* eligible for court/judge decision as a matter of law at -dismiss time. The statements that are subject to defamation protection are *statements of fact, whether or not they are also statements of opinion.* It is

only statements of ***pure (unmixed) opinion*** (i.e., *zero factual content*) that are exempted from defamation protection (but: **true "pure" "opinion" (vs. "fact") essentially doesn't even exist** — it's a continuum, not a dichotomy — according to the quotation from *Sack* given just below in this endnote/Annotation).

And *that* ("mixed/intertwined opinion/fact statements") is what's at stake in the case-at-bar (and in the vast majority of defamation cases, for that matter). For, indeed: **Marshall himself explicitly admits that he actually *believes* the factual content of everything he writes as *opinion*** (*e*96 *infra*).

Note that this very fact-vs.-opinion issue has already been explicitly addressed by Plaintiff at Opp ℘3–5 — where, in fact, Plaintiff also quotes the very same teaching that Defendant does (*Lyons I, supra*), but does so via the intermediary of *Yohe v. Nugent* (see Opp℘5 for citation), which crucially also adds consideration of the essential, more modern/advanced, component of **defamatory implication‡** — which Marshall and the Judge are now pretending to ignore.

In this connection, note especially the quote in Plaintiff's footnote at Opp℘4f5, regarding the **fact/opinion (that is, objective/subjective) dichotomy** :— "Despite decades of modern first amendment [defamation] litigation, courts continue to struggle with the basic distinction between fact and opinion." Or again (*Sack* §4.1): "No task undertaken under the law of defamation is more elusive than distinguishing between fact and opinion. Analysis is complicated because communications common consist of intertwined allegations of fact and opinion … Indeed, **there is some opinion in any assertion of fact, and some factual content in every statement of opinion [i.e., truly 'pure' opinion doesn't even exist].**"

Example of defamation-by-implication: The Alex Jones / Sandy Hook case, cited in *e*143 *infra* (see the referenced Motion-to-Dismiss cited there).

{† • "[I]f the statement 'John is a thief' is actionable when considered in its applicable context, the statement 'I think John is a thief' would be equally actionable when placed in precisely the same context. … Even if the context

suggests a statement is opinion [as Marshall pretends to claim, with his pretended over-arching all-encompassing About-page "opinion disclaimer"], it may be a statement of fact. Merely cloaking an allegation of fact in the garb of an opinion — 'I think that Ernie had too much to drink' — does not assure that it will not be held to state or imply a provably false and therefore potentially actionable statement of fact." — *Sack* §4.3.1.1. The Supreme Court's own way of saying this same thing is presented in *e*19 *infra.*}

{♯• (i) To quote the "hornbook" on "defamatory implication" (*Restatement (Second) of Torts* §566, emphasis added): "*Expression of Opinion.* A defamatory communication ***may*** consist of a statement in the form of an ***opinion,*** but a statement of this nature is actionable only if it ***implies*** the allegation of undisclosed [or, disclosed but false] ***defamatory facts*** as the basis for the opinion." (ii) The classic sample instance of defamatory implication is the "Captain sober today" case (Google search that; see http://volokh.com/2012/05/20/an-interesting-defamation-case/) — which should now be analyzed in the light of *Air Wisconsin v. Hoeper,* 571 U.S. ____, 134 S.Ct. 852 (2014), that is, the Supreme Court's newly revived defamation concept of **"material falsity"** (as opposed to *literal language* used), i.e., "effect on reputation of defamee in the context/minds of the relevant audience/readers/listeners." (iii) "By statute, Massachusetts permits a plaintiff to recover for a truthful defamatory statement published in writing (or its equivalent) with actual malice, G.L. c. 231 §92 …" — See *Phelan v. May Department Stores Co.,* 443 Mass. 52 n.4 (2004) (emphasis added).}

19 *[Tuvell]* This is Marshall's primary argument: "stated as opinion." Over and over again, Marshall thumps his claim/pretension (paraphrasing): "All the speaker/writer needs to do is one-time prophylactically pre-label 'all' his utterances as 'opinion" — that 'pre-inoculates' his audience, and 'pre-immunized' himself against defamation liability." But that's a ridiculous argument, as argued/proven in *e*5,25,72,77 …

… and to those arguments we here also add the ruling of *Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990) (see also https://en.wikipedia.org/wiki/Milkovich_v._Lorain_Journal_Co.) — **which rejects the pretension that a**

separate opinion privilege (Constitutional or otherwise) exists against defamation, as follows (emphasis added):

"If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts [true or false] which lead to the conclusion that Jones told an untruth. Even if the speaker states ['discloses'] the facts upon which he bases his opinion, *if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact [hence be defamatory].* Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' As Judge Friendly aptly stated: '[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, **explicitly or implicitly,** the words "I think."'"

20 *[Tuvell]* https://ethicsalarms.com/about/.

21 *[Tuvell]* https://ethicsalarms.com/comment-policies/.

22 *[Tuvell]* No, "everything" is *not* "covered by that," because Marshall here ignores that many/most of the statements under discussion are *mixed* fact/opinion statements, *not pure/unmixed opinion* — and hence, such mixed statements are *not* "covered," by the discussion of *e*18 *supra.*

23 *[Tuvell]* Marshall refers here to his post of 6:07 p.m. Aug 28 2017, at OppExhA℘15–16, which is analyzed at Comp℘7–15¶14.

24 *[Tuvell]* No, this is false: Marshall didn't say this "at the beginning of the primary post," and he didn't "frame the entire thing that way" (that is, he didn't intend it to apply to that whole primary post). He said it in the midst (not "at the beginning") of that post, and intended it to apply only to his comment about Tuvell's PTSD. See *e*25 *infra.*

25 *[Tuvell]* Marshall is lying/misleading here. He's speaking about the following passage (OppExhA℘16), where he wrote:

"I read as much of the entry on his blog [referring to the webpage http://

judicialmisconduct.us/CaseStudies/WETvIBM on Tuvell's website (which is, incidentally, not a so-called 'blog')] — which purports to be about judicial misconduct in summary judgments generally, but is in fact only about his case — as I could stand, and realized that Walt is, in technical terms — this is an opinion, Walt, not an assertion of fact, you can't sue me: put down the banana — a few cherries short of a sundae."

Marshall's purported pre-inoculation/immunization ("opinion … you can't sue me") is referring specifically only to the language, "a few cherries short of a sundae." That *language per se,* without more, is indeed obviously a mere/trivial opinionated/rhetorical/exaggerated/hyperbolic insult/ridicule/abuse, not an assertion of fact — and Plaintiff does *not,* in fact, anywhere complain about such *"merely-insulting"* language as an element of a cause-of-action for the instant lawsuit. See also the criticism of Marshall's "opinionation" at Opp$_{\wp}$3–5.

The things Plaintiff *does* complain about, here and elsewhere, are *other* things, which *are* false statements of fact, and/or involve defamatory implication. In this instance: (i) the false statement just quoted that "Tuvell's website is not about judicial misconduct generally, it's **in fact [not opinion]** only about his case" (paraphrasing, emphasis added); (ii) the false statement of fact (by defamatory implication) that Tuvell is somehow "mentally defective" ("a few cherries short of a sundae," which is factually falsely defamatorily implicative, to the extent that it depends on the predicate false statement that "Tuvell's website is only about his case," and/or that Tuvell's website claims about Judicial Misconduct in the case *Tuvell v. IBM*); (iii) the false statement of fact (by defamatory implication) that Tuvell's PTSD somehow renders him "mentally defective" (which is defamatory *per se,* see *e*134(β) *infra*).

In addition to which: Any such attempted inoculation/immunization is ineffective anyway, in any defamation case. For, what matters is whether or not a challenged statement *really is a statement of fact (wholly or partially, directly or indirectly, including "defamatory implication")* — not whether the author attempts/pretends to *characterize* it as "opinion only."

26 *[Tuvell]* No, Marshall did *not* "frame the entire thing that way." Instead, he only framed the explicit language "a few cherries short of a sundae" that way, as explained in *e*25 *supra.*

27 *[Tuvell]* Actually, there appear to be *six* categories. See *e*60 *infra*, and the sub-count calculations in *e*17 *supra*.

28 *[Tuvell]* Exactly which five instances? (It's important to know what he's talking about!)

29 *[Tuvell]* Except that, no such "disruptive and insulting comments" ever occurred, instead they were "invented" by Marshall (as argued in Opp).

30 *[Tuvell]* No, Plaintiff does not argue that the "mere administrative act" (without more) of "banning" was defamatory. Instead, it is argued that Marshall's stated **reasons for banning:** (i) were false (and defamatory); and/or (ii) were not the actual reasons for banning (that is, the actual reasons for banning were undisclosed, with defamatory implication, as discussed in *e*18 *supra*).

31 *[Tuvell]* Exactly which three instances?

32 *[Tuvell]* For Marshall to pretend, as he does here, that he made "only three false statements" is a blatant asinine lie. He made (and/or hinted, via repeated contextual defamatory implication) *dozens.* See Comp & Opp, *passim.*

33 *[Tuvell]* The discussion referred to here occurs at OppExhA℘1–2,6–8. But note, Marshall's crazed attribution of academicism, while both false and defamatory, is ***not*** even one of Plaintiff's complained-of instances of defamation (as explained at Opp¶12ƒ18). This "academicism" incident does, in any event, demonstrate Marshall's knee-jerk **"actual malice"** (in the technical sense of defamation law, see *Sack* §1.3.1) towards Tuvell.

34 *[Tuvell]* Yes, that attribution of "academicism" was defamatory (**in the prevailing context,** of (i) the composition of the audience, and (ii) Marshall's accompanying/explanatory verbiage), as explained at Comp℘5¶8.

35 *[Tuvell]* Marshall is here trying to invoke the received teaching that "statements of opinion based upon disclosed facts cannot be defamatory." But he falsely (in bad faith) misstates/misuses that teaching. Namely, the teaching *actually* refers to: "protected statements of (i) **pure** opinion, based upon (ii) **true/accurate/correct known/disclosed** facts." Plaintiff's complained-of defamations are all based upon (i′) **mixed** opinion/fact statements, and/or based upon (ii′) **false and/or undisclosed** fact-statements.

For (i′) **proof of falsity** (to the extent required at this Motion-to-Dismiss time, i.e., pleading, not evidence), see Comp & Opp, *passim.*

For (ii′) **false and/or undisclosed facts,** an excellent *example* is given by the "theft of professional services" incident (see ℘27). As argued at Opp℘7ƒ7, there simply were **no disclosed** facts anywhere (within the range/context of the audience, see OppExhA) that could conceivably indicate to anyone that Marshall provided any professional/paid services on his blogsite (https://ethicsalarms.com), much less that Tuvell sought to steal such services. (Marshall *does* peddle his "professional/expert" services on his *other/* business website, https://proethics.com, but Tuvell never had any interest in or discussed that site with Marshall.) So, *however* it was that Marshall concluded that Tuvell was trying to wheedle "free, expert assistance," it *must* have been based upon some kind of **false and/or undisclosed** facts (which remain to this day unknown to Tuvell, and to all other audience members).

36 *[Tuvell]* Exactly which eleven instances?

37 *[Tuvell]* (i) The quoted passage occurs at OppExhA℘15, and is discussed at Comp℘18–19¶I. (ii) "The reason Walt is interested in judicial misconduct" is ***not*** that "the judge decided his case was lousy" (which she did *not* do, because she **did not reach/decide "his case" at all**), but ***rather*** that "the judge lied and obstructed justice, by falsifying the facts of *Tuvell v. IBM* (as explained on Plaintiff's website, at http://judicialmisconduct.us/CaseStudies/WETvIBM, especially the 'Smoking Gun' screenshot thereat)."

38 *[Tuvell]* Marshall may *claim* the statement he discusses here was "his characterization and his belief," implying that it therefore could not be defama-

tory, because it was "based upon known/disclosed true facts." But, what he says/believes is false. Namely, Marshall's statement of opinion ("Tuvell's case was lousy") was actually based upon a **false** "disclosed fact" (that the "judge decided Tuvell's case"), as explained at Comp$_{\wp}$10p¶I (the meta-comment there attached to the word "lousy"), and defamatory.

39 *[Tuvell]* While it is true, to some degree (depending on degree of interest, time available, investigatory savviness, knowledge/skill in the underlying subject matter (legalistic technicalities, involving Summary Judgment, Judicial Misconduct, etc.), etc.), that "anyone who wanted to check it out, could check it out," that's *irrelevant* here.[†] Because, the ability of anyone to "check out" a defamer's statements is simply not an element of a cause-of-action for defamation, either generally or *(a fortiori)* at Motion-to-Dismiss time. *e*143 *infra*.

{† • Even though the observation "anyone *could* check it out" is irrelevant, it is indisputable that in the instant case-at-bar, (some/most/all of) the participants involved in the blog discussion (OppExhA) *in fact did not "check it out."* In fact, Marshall himself admits to being guilty of this (as quoted toward the end of *e*143 *infra*).}

40 *[Tuvell]* Exactly how many instances of this does Marshall claim? (I'm guessing it's four, given the discussion of sub-counts in *e*17.)

41 *[Tuvell]* The passage from *Yohe v. Nugent* Marshall apparently refers to is this:

"In sum, the statements challenged by Yohe all fall into one of three categories: (1) unrefuted statements of fact; … As none of these types of statements provides a basis for a defamation cause-of-action, Yohe's defamation claim … fails."

Really, there's no need to cite any specific case (such as *Yohe v. Nugent*) for the proposition that neither (i) true statements of fact (disputed or not), nor (ii) undisputed (stipulated, agreed upon) statements of fact (true or false), provide an element of cause-of-action for defamation — because it's "hornbook" (provided as always, and as *Yohe* itself explicitly acknowledges

(as noted in *e*18 *supra*), that no "defamatory implication" is involved). But, of course, Plaintiff in the instant case nowhere complains about any "unrefuted statements of [true] fact."

42 *[Tuvell]* OppExhA℘15.

43 *[Tuvell]* The quoted passage occurs at OppExhA℘16. The "personal agenda" Marshall speaks of here is also explained at OppExhA℘16, namely:

"I'm sorry for Walt's troubles, but he was not honest, and misrepresented his purpose by the charming device of insulting my integrity. Obviously, he wanted to check and see whether my sympathies would be with his cause before submitting it for consideration. As I tell my clients, I can't be bought, and you take your chances. Walt was also obviously looking for a cheap, as in *free,* expert opinion that he could use in his crusade against the judge." — **Which are statements of fact (possibly mixed with opinion), and/or opinions with defamatory implication, and all of which are <u>false</u>** (hence cannot be adjudicated by a judge at Motion-to-Dismiss time, but must be decided by a jury at trial).

44 *[Tuvell]* BUT, IT IS FALSE! This is explained at Comp℘12–14¶O.

Note, incidentally but very importantly, that Marshall here **admits** — by explicitly/emphatically formulating his statement, *"I believe that is true"* — to promulgating **"(mixed/intertwined) <u>*fact*</u>"** (albeit *false* fact), as opposed to his pretended **"(pure) <u>*opinion*</u>*:*"**

I believe *{opinion}* **that is true *{fact}.***

And here's another ready example, where Marshall **admits** he's dealing with facts (at least in his mind), not opinions: "the **fact** that the entire American Left, along with its sycophants and familiars, the universities, show business and the news media, have gone completely off the ethics rails since November 8, 2016" (OppExhA℘1, emphasis added). The point being, of course, that since much of Marshall's audience view him as "God" (*e*130 *infra*), they automatically/blindly ***believe as fact* anything he *calls "fact."***

Opinions are, by definition, statements that are *subjective/indefinite*

judgments/viewpoints/beliefs/perspectives/positions/stances/attitudes/assessments/conceptions/conjectures/estimations/persuasions/etc. — hence, they are incapable of being described as "true/false/correct/incorrect/accurate/inaccurate/verifiable/falsifiable/provable/disprovable" (it is only *objective/definite* statements of *facts,* about such things as historical events or mathematical theorems, that are capable of being "true/false/etc."). The most one can assert about opinions is that they're "right/wrong" (in the moralistic sense of "righteous/unrighteous/virtuous/wicked," or similar language, but certainly not "true/false/etc."), because it's those kinds of words that convey "degrees of opinionation/judgmentalness." As already noted (*e*18 *supra*), the opinion/fact spectrum is a continuum — there can be *many* "opinions," but only *one* "fact" — "you're entitled to your own opinions, but not to your own facts."

More generally, see *e*96,97 *infra.* Marshall's admission of belief in the truth of the facts underlying his opinions (some such facts always existing, *e*18 *supra*) falsifies Marshall's earlier assertion (see *e*22 *supra*), to the effect that "*everything* on his blog is 'covered' as being *opinion,* not *fact.*" And remember: Marshall is a *lawyer,* so he knows/understands these niceties of nuance, and hence he can't pretend "it was just a slip of the tongue." [Thank you, Jack.]

45 *[Tuvell]* By **admitting** here, as Marshall does, that the act of banning was *not* a mere "administrative act" (see *e*30), but rather was based upon his false statements about "abuse for personal agenda" (based on blatantly false and/or undisclosed facts), Marshall hereby demonstrates/proves precisely Plaintiff's claim (in *e*18 *supra*) that the banning did indeed have **defamatory implication.** [Thank you, Jack.]

46 *[Tuvell]* By this language — "he contacted me" — Marshall is saying/implying that he's speaking about Plaintiff's original/initial email of Aug 26 2017 (at OppExhA℘7). But what he says about it is false, because that email said nothing about Marshall's lack of coverage of Judicial Misconduct.

47 *[Tuvell]* This is false. Plaintiff never said anything of the sort.

Judicial Misconduct was first mentioned, briefly, in Plaintiff's first post to the Ethics Alarms blog on Aug 27 2017 (also at OppExhA℘7), and that post did mention nothing about Marshall's lack of coverage. The context in which Judicial Misconduct first did appear substantively was Plaintiff's later post (at OppExhA℘13), but it also did *not* say anything resembling "Why don't you ever write about Judicial Misconduct?" What it observed, simply/straightforwardly/correctly, was that Marshall (and/or his blog participants) hadn't picked up on Plaintiff's discussion-thread issue concerning his experience with Judicial Misconduct in the sense of institutional abuse of Summary Judgment:

"I was initially attracted to you because you're trained/savvy in the law, and I wanted to ask you[r] opinion about the ethics of Judicial Misconduct, specifically in the sense of institutional abuse of the Summary Judgment process (e.g., http://judicialmisconduct.us/CaseStudies/WETvIBM#smokinggun). You've done nothing to address that, and nobody on this site appears to have any inclination to [do] so." — Which Marshall later falsely misparaphrased/mischaracterized (OppExhA℘15) this way: "[Tuvell] posted a comment saying that the blog advertised itself as covering judicial misconduct and doesn't."

The closest Plaintiff came (but it's not very close) to saying about Marshall's lack of coverage of Judicial Misconduct came in the post where he wrote (OppExhA℘10,13): "I tuned into this site in the hope/expectation of finding a discussion of ethics, without the smokescreen of partisan politics clouding the air. I even proposed a topic, Judicial Misconduct, with examples (http://JudicialMisconduct.US). But no takers. Such things appear not to be what this site is about. … Oh, and another thing: Why in the world did I ever think Jack (and by extension this blog/website) might be interested in Judicial Misconduct? Why, it's advertised on the About page, of course: 'I [Jack] specialize in legal ethics …'"

48 *[Tuvell]* Marshall appears to be referring to his post to the effect that (OppExhA℘15, emphasis in original): "there are **dozens** of judicial ethics posts."

49 *[Tuvell]* Marshall writes falsely, where he pretends to conflate/confuse **Judicial Misconduct** (which was/is Plaintiff's concern) with **Judicial Ethics** (which is Marshall's concern (one of them), or so he claims). But these two are distinct/different realms of concern (with indeed some mutual relationship, whereas Marshall falsely pretends they are identical). Namely, as documented on Plaintiff's website, which Marshall had been pointed-to by Plaintiff (at http://judicialmisconduct.us/Introduction, under separate successive subheadings): (i) **Judicial Ethics** is "softly/fuzzily aspirational," governed by *The Code of Conduct for United States Judges (USCC, CodCon)* and the *ABA Model Code of Judicial Conduct (ABAMC);* whereas (ii) **Judicial Misconduct** is "solidly/rigidly statutory," governed by the *Judicial Conduct & Disability Act (JCDA, 28 USC §332(d)(1),351–364)* and the *Judicial Conduct & Disability Rules (JCDR).* No competent professional legal ethicist (as Marshall pretends/advertises himself to be) would ever legitimately conflate/confuse these two realms of concern.

50 *[Tuvell]* It is false for Marshall to pretend he was not aware ("constructive knowledge") of Plaintiff's website and its concerns, because Plaintiff had by this point explicitly pointed him to it (OppExhA℘7).

51 *[Tuvell]* To clarify, yet once again (since Marshall persists in falsely misrepresenting Plaintiff's arguments): (i) Judge Casper did *not* "dismiss 'his case'" (**she dismissed a case she invented, by falsifying the facts of Plaintiff's case,** *e*37 *supra*); (ii) Plaintiff's claims of Judicial Misconduct against Judge Casper are based on her violation of judicial/legal rules of Summary Judgment, Falsification of Facts, Obstruction of Justice, etc. (and *not* in the mere fact of "dismissing the case").

52 *[Tuvell]* Marshall speaks falsely here ("slyly … without me knowing it"), because Tuvell had expressly informed him of his concerns earlier, at the beginning of their interaction (OppExhA℘7).

53 *[Tuvell]* OppExhA℘15. See https://en.wikipedia.org/wiki/Sandbagging for the (defamatory) definition of "sandbagging."

54 *[Tuvell]* Rule 8.2 of the *Massachusetts Rules of Professional Conduct* (which

embodies the rules of “Legal Ethics,” in the sense that Marshall teaches it) states (in relevant part): “A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or a magistrate …”

The corresponding Rule 8.2(a) of the *ABA Model Rules of Professional Conduct (ABAMRPC)* (which is the document Marshall holds in his advertising/publicity photo at https://proethics.com/, with a “fair use” copy at http://judicialmisconduct.us/CaseStudies/TUVELLvMARSHALL) states: “A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer …”

But of course, Plaintiff never asked/wanted Marshall to do any such thing.

55 *[Tuvell]* Why, exactly? Where/what, ***exactly,*** is the “falsity” that Tuvell publishes on his website?

56 *[Tuvell]* And where ***exactly*** was the “trickery,” given that Tuvell had been everywhere straightforward/truthful/above-board in all his dealings with Marshall?

57 *[Tuvell]* Exactly which seven instances?

58 *[Tuvell]* See *e*21. As long as Marshall is plumping his comment guidelines here, we note that those very guidelines are quite clear that insults (by himself or others) are disindicated. So, by admitting here his insulting of Mr. Tuvell, we see that Marshall was violating how very own guidelines.

59 *[Tuvell]* And, of course, Plaintiff nowhere improperly cites “mere insult/epithet/name-calling/hyperbole” as defamatory — except insofar as it properly involves *defamatory implication* (*e*18 *supra*), and thereby furthers fans the flames of reputational damage.

60 *[Tuvell]* This seems to introduce a sixth category, above and beyond the five Marshall spoke of at ℘6 *supra.*

61 *[Tuvell]* Exactly which three instances?

62 *[Tuvell]* Apparently referring to Marshall's "33 separate instances," see *e*17 *supra*.

63 *[Tuvell]* Marshall fails/refuses to list "disability" here. And that's significant, given that he clearly *does* discriminate/abuse on the basis of disability — specifically with respect to Tuvell's PTSD, which he characterizes as "a few cherries short of a sundae" (*e*25,26 *supra*). Note that PTSD is covered by the ADA, for example: https://www.eeoc.gov/eeoc/foia/letters/2008/ada_disability_employee_misconduct.html.

64 *[Tuvell]* Multiple things need be said here:

(i) In the first place, Tuvell's main/initial "question/observation" (not even a "complaint," as it was done in private email to Marshall, see *e*46 *supra*) about Ethics Alarms was that it seemed to be mostly about "petty political/partisan harangue/ax-grinding," as opposed to the "purely ethical discussion/debate" apparently promised by the About page (*e*20 *supra*).

(ii) In the second place, the secondary observation, concerning bias/slant (and in which direction, namely, Left-to-Right), of the said political/partisan discussion environment was only ever a parenthetical comment (in the introductory preliminary private email, not as a website discussion topic), never a proposed topic for discussion.

(iii) Tuvell never even considered the issue of whether "Left is 'better' than Right, or *vice versa*." It was only the *fact* of partisanship, not its *propriety*, and the dissonance of such partisanship with the website content ("design vs. implementation of website") that was ever observed.

(iv) Marshall's "over and over again" is a blatant lie. Tuvell lodged his question/observation only a single time (in the introductory private email). It was *others* on the blogsite, not Tuvell, who kept trying to re-raise it (the trumped-up/false charge) "over and over again," with Tuvell always trying to disavow it and tamp it down.

(v) A conversation involving "political partisanship" in no sense rises to the level of the sort of "race, religion, sexual orientation, gender, etc." abusiveness that Marshall states he finds objectionable.

(vi) *Even if* Tuvell *had* raised a Left-vs.-Right discussion topic (as op-

posed to the mere presence of political/partisan debate), that would have been a perfectly valid topic to be raised/discussed on Marshall's website — it was not a reason for him to become "angry."

(vii) As for the *correctness/validity* of the preceding items ((i)–(vi), this list): Tuvell continues to stand by them, and they're a matter for a jury to decide, not a judge at Motion-to-Dismiss time. So they certainly do not belong in the present proceedings, and hence it's inappropriate for Marshall to even raise them here.

65 *[Tuvell]* Marshall's "primary post," see *e*23 *supra.*

66 *[Tuvell]* But, Marshall's "explanation why" is all false. Comp℘12–14¶O.

67 *[Tuvell]* See *e*25 *supra.*

68 *[Tuvell]* Here the Judge gestures towards his copy of OppExhA.

69 *[Tuvell]* Tuvell's usage here of "single" was an inadvertent slip-up/tongue-stumble. He should have said "certain."

70 *[Tuvell]* Tuvell's usage here (twice) of the phrase "as opposed to" was a linguistic slip-up. He should have said "as concerning." The reason for the slip-up can be seen by *e*71 *infra.*

71 *[Tuvell]* The "much more [*as opposed to* the bare facts]" Tuvell has in mind here are his own website, along with all the laws/cases/etc. attendant thereunto.

72 *[Tuvell]* This new question about the "forum"/audience is separate/different from two other of the Judge's concerns (about the *size* of the audience at *e*2 *supra,* and about the investigative responsibilities of the audience at *e*143 *infra*), but it joins one other of his concerns (about the effect on the audience at *e*5 *supra*). The issue here — "prophylactically labeling as opinion, *pre-inoculating* the audience, *immunizing* himself" — is just as bogus as his earlier focus on the *size* of the audience (*e*2 *supra*). For, this new question is simply *not* a factor as an element of a cause-of-action for defamation generally (*e*3 *supra*), much less *(a fortiori)* at Motion-to-Dismiss time: because, "mere *labeling*" as opinion is not sufficient; it must "actually *be*" (pure, fact-free)

opinion (and in the case-at-bar, it isn't, because it everywhere carries a component/connotation of factuality, falsely).

73 *[Tuvell]* There is no reason in the world for the Judge to bring up "newspapers" here. Defamation by news media is a specialized subspecies of general defamation, which is totally irrelevant to the case at bar. So why muddy the waters? Attempting to bamboozle/hoodwink/swindle the *pro se* Plaintiff?

74 *[Tuvell]* Short answer: No, it doesn't matter (see *e*77 *infra*).

75 *[Tuvell]* Marshall here refers to the well-known so-called *"litigation privilege,"* whereby statements made pursuant to official judicial proceedings are granted absolute immunity from civil liability for defamation (the rationale being that the integrity of the adversary judicial system outweighs the reputational interest of any party).

76 *[Tuvell]* Internet anonymity can be problematic in the defamation context. See Gotelaere, Defamation or Discourse, https://scholarlycommons.law.case.edu/jolti/vol2/iss1/3/.

77 *[Tuvell]* This is an absurd conclusion, as it is based upon a false equivalence with the litigation privilege (*e*75 *supra*). Namely, the litigation privilege serves an important public policy (integrity of the judicial system), while "pre-'warning' a victim (by "pre-'inoculating' an audience") that you feel free to commit future defamation by pretending to label everything you say as 'opinion'" serves no such purpose. Indeed, such a concept has no precedent/support in the law of defamation, and effectively neuters it: "prophylactic inoculation" is simply *not* a factor as an element of a cause-of-action for defamation generally, much less *(a fortiori)* at Motion-to-Dismiss time.

In any case: merely/unilaterally *labeling/declaring* a statement — whether past, present, or future — as (pure, unmixed) "opinion" does not *make* it actual opinion (in the eyes/ears of the victim/law/jury). See again the quotes toward the bottom of *e*18 *supra*).

78 *[Tuvell]* Thankfully Marshall does not bother "going there" with his First Amendment musings (for they certainly do not apply to the instant case,

there being no federal/state/governmental question involved).

79 *[Tuvell]* No, he can't do that. The technology doesn't exist (see ℯ140 *infra*). Even apart from that impossibility, Marshall has no way to determine how many *others* learned about the defamatory posts (such as blog readers reading or forwarding screenshots to others).

See also the criticism of the "250" figure at Opp℘17–18. To which we now note that Marshall himself revised that figure to "≤ 488," in a Notice of Errata he filed with the Court on Jun 1 2018, in preparation for this Oral Argument.

80 *[Tuvell]* But of course, "tiny percentage" is utterly irrelevant. See ℯ2 *supra.*

81 *[Tuvell]* Literally, Marshall said "visitors" instead of "users," but these terms are synonymous (meaning "unique/distinct individuals visiting a website") in the standard terminology of "Internet analytics" — as distinct from other related terminologies, such as "registered accounts", "pageviews," and "sessions." See, e.g., https://blog.hubspot.com/marketing/guide-to-web-analytics-traffic-terms.

82 *[Tuvell]* See https://ethicsalarms.com/2018/06/06/afternoon-ethics-warm-up-6-6-18-special-dont-sue-me-these-are-just-opinions-edition/. That post speaks inconsistently of "9,000,000 views," as opposed to the "9,000,000 visitors/users" Marshall reported at this oral hearing (so it's impossible to tell which interpretation is intended/correct).

83 *[Tuvell]* Tuvell doesn't "frequent/follow" Marshall's blog (in the standard sense of "regularly actively reading and paying attention to it"), but in preparation for this oral hearing (Jun 7 2018) he did check it the preceding day, and there saw Marshall's post advertising the 9,000,000 figure (without noting whether the post spoke of "visitors/users" or "pageviews").

84 *[Tuvell]* See ℯ20 *supra.*

85 *[Tuvell]* https://proethics.com/.

86 *[Tuvell]* Technicalities about this terminology (what's a "blog" vs. a "forum," etc.), is discussed at http://judicialmisconduct.us/forum/HowToUseForums.

87 *[Tuvell]* Hence, defamatory *per se*. *e*134(α) *infra*. In Comp¶18, instead of "vocation," Tuvell used the synonymous words, "position/job/calling/field."

88 *[Tuvell]* The concepts of "pubic figure" and "limited-purpose public figure" are significant in defamation law, and are currently in flux in the Internet context. See Diss℘8¶A, Opp℘11.

89 *[Tuvell]* See *e*20 *supra*.

90 *[Tuvell]* See *e*21 *supra*.

91 *[Tuvell]* See *e*77 *supra*.

92 *[Tuvell]* Boy, do we ever "know that's true" (*calling* something "opinion" — even via immediate/direct prefacing, such as "I think," or "in my opinion," or Glenn Beck's slimy disclaimer "I'm just saying" — does not *make* it "opinion"): see the citations to *Sack* and *Milkovich* in *e*18,19 *supra*.

93 *[Tuvell]* This kind of "satiricism/parody inoculation" is valid/effective, and very different from the "opinionism inoculation" discussed at *e*25,72,77 *supra*. Satiricism means: "What I say has *false* factual content." Opinionism means: "What I say has *no* factual content" — which is basically impossible.

94 *[Tuvell]* https://www.snopes.com/.

95 *[Tuvell]* See https://en.wikipedia.org/wiki/Category:Fact-checking_websites.

96 *[Tuvell]* At https://ethicsalarms.com/about/, Marshall writes (emphasis added): "The objective isn't to be 'right,' though **if I post an *opinion*, I *believe* it**" — including, presumably, vouching for the correctness/truth of the facts underlying the opinion.

97 *[Tuvell]* We now know, by Marshall's language "I believe that is true" (*e*43 *supra*), that his blanket affirmation of "belief in his opinions" (*e*96 *supra*) really entails "belief in the truth of the facts underlying the opinions." Of course, this is not unique to Marshall (see *e*18,44 *supra* and *passim*): it's universally the case that when people "give their opinions," they're basing them on some underlying stratum of (explicit and/or implicit) facts, which they assume are true. Otherwise, they're giving their opinions in a vacuum — which

is insipid.

98 *[Tuvell]* That list, which Tuvell compiled in the hour preceding this oral hearing, can be viewed at http://judicialmisconduct.us/sites/default/files/2018-07/Notes.pdf.

99 *[Tuvell]* At Diss℘7¶2, Marshall falsely cites case law that deals with *slander,* as opposed to *libel.* This is pointed out and rebutted at Opp¶10.

100 *[Tuvell]* Referring to OppExhA.

101 *[Tuvell]* The "99%" here refers, in context, to the immediate instigating facts of the case (as opposed to the additional "much more" mentioned in *e*71 *supra*). Namely, Marshall deleted two of Tuvell's posts (see Opp℘14ƒ21), and those comprise the remaining/missing "1%."

102 *[Tuvell]* These notes can be viewed at http://judicialmisconduct.us/sites/default/files/2018-07/Notes.pdf.

103 *[Tuvell]* See *e*8,10 *supra.*

104 *[Tuvell]* The inapplicability of Ch. 93A has already been argued at Opp℘9. So, it's unclear why Defendant pretends to uphold that false fiction here.

105 *[Tuvell]* See *e*9 *supra.*

106 *[Tuvell]* The bogosity of registered mail has already been argued at Opp℘9–10. So, it's unclear why Defendant pretends to uphold that false fiction here.

107 *[Tuvell]* This is an explicit dead giveaway, that the Judge is **falsely considering "damages"** at Motion-to-Dismiss time. That is a false misstatement of the law. "Damages" is simply *not* a factor as an element of a cause-of-action for defamation generally, much less *(a fortiori)* at Motion-to-Dismiss time; it's not in any standardized "hornbook" list, see *e*3 *supra*. — **Damages are especially irrelevant in this Massachusetts jurisdiction, where all libel is *per se* (*e*3 *supra*).**

108 *[Tuvell]* "Rule 12" refers to "Motion-to-Dismiss," MCRP 12. Opp℘2.

109 *[Tuvell]* Comp℘17¶19.

110 *[Tuvell]* See *e*37 *supra.*

111 *[Tuvell]* This is the “Smoking Gun,” see http://judicialmisconduct.us/CaseStudies/WETvIBM#smokinggun.

112 *[Tuvell]* Tuvell misspeaks/misremembers what Marshall said here. Instead of the word “asshole,” Marshall used the word “jerk,” see ℘9 *supra.* (Tuvell was conflating this with Marshall’s use of the word “asshole” on his website, OppExhA℘16.)

113 *[Tuvell]* Concerning the dangers of quoting out-of-context: “If you give me six lines written by the hand of the most honest/honorable of men, I will find something in them which will hang him.” See http://judicialmisconduct.us/sites/default/files/2017-04/01_PetWritCert%2BApx_0.pdf#page=32.

114 *[Tuvell]* I.e., “defamatory implication,” see *e*18 *supra.*

115 *[Tuvell]* Namely, what it says/implies (“contextually defamatory implication,” “CTXDEFIMPL,” *e*18 *supra*) is that the whole case/website are incorrect/wrong/mistaken/false/invalid/lies/etc. — all of which are **statements of fact** (and false ones, at that), which can be adjudicated only by the ultimate fact-finder (jury) at trial, not the judge (in a non-bench trial).

116 *[Tuvell]* Referring to the tag “CTXDEFIMPL” (“Contextualized Defamatory Implication”) used throughout Opp.

117 *[Tuvell]* See *e*48 *supra.*

118 *[Tuvell]* See *e*49 *supra.*

119 *[Tuvell]* See *e*49 *supra.*

120 *[Tuvell]* Tuvell here started to discuss some of the recent history of Judicial Misconduct (JCDA, JCDR, see *e*49 s*upra*), but was interrupted by the Judge.

121 *[Tuvell]* The Judge here (“proving things false for the sake of proving things false”) *completely misstates* (innocently or maliciously) Tuvell’s argument in this area, so Tuvell had a hard time deciphering the depths of the judge’s off-the-wall misunderstanding in real-time. Tuvell eventually was able to dredge

up a response (as recorded in this transcription), ultimately calling it “a fine point,” so it may also help to recapitulate it again, here/now, as follows:

(i) The point is *not* that Defendant miscounted the number of times he wrote about Judicial Misconduct (and/or Ethics); nor even, without more, that (ii) Defendant conflates the concepts of Judicial Misconduct and Judicial Ethics. (iii) Plaintiff does *not,* in any event, anywhere even complain directly (that is, out-of-context) about these items (i–ii), without more. (iv) Instead, the point is that Defendant makes defamatory/false statements of facts (“Plaintiff’s case/website are lousy,” in various manners/locutions), whilst, in-context, falsely portraying himself as an expert on legal/judicial ethics/misconduct — thereby harming Plaintiff’s reputation. (v) And so, what *is* being proved by Plaintiff’s argument in this area is this: By (genuinely or pretendingly) not even apprehending/appreciating/acknowledging the fundamental distinction/difference between Judicial Misconduct and Judicial Ethics, Defendant is *not* actually the “legal ethics expert/professional” he portrays himself to be — thereby committing the element of cause-of-action for defamation of being “grossly/inexcusably negligent/antipathetic about truth/falsity,” with regard to critiquing/defaming Plaintiff’s case/website (and, in addition, he’s guilty of falsely inflating his own standing in the presence of the audience/community of interest, in order to pump-up his credibility to defame Plaintiff — which may become eventually relevant as a consideration in a damages/punishment discussion).

122 *[Tuvell]* “Strictly … the whole Judicial Misconduct proceedings” referring to the JCDA and JCDR, see *e*49 *supra.*

123 *[Tuvell]* Referring to *Tuvell v. IBM.*

124 *[Tuvell]* Again, the Judge falsely misstates the law here: (i) “actual” defamation (as opposed to “potential tendency”), see *e*4 *supra*; (ii) “damages,” see *e*107 *supra*.

125 *[Tuvell]* No, it doesn’t “gotta hurt you,” it’s only “gotta have the *potential/tendency* to hurt,” etc. See *e*4,124 *supra*.

126 *[Tuvell]* See *e*125 *supra.*

127 *[Tuvell]* See *e*125 *supra.*

128 *[Tuvell]* See *e*125 *supra.*

129 *[Tuvell]* Tuvell here sees the Judge is forcing him to play the Judge's false game ("*did actually* harm," as opposed to "*potential/tendency* to harm"), and so must try to play along as best he can.

130 *[Tuvell]* That is, "easily swayed by someone self-proclaimedly/seemingly authoritative," namely Marshall. Because, recall, the audience/forum consists largely/wholly of non-lawyers, generally incapable of detecting truth/falsity of legal assertions from a lawyer such as Marshall.

131 *[Tuvell]* The "context" here being the ambient environment wherein "Marshall asserts he's an expert on the subject of Judicial Misconduct, and his readers blindly/automatically believe everything he says (including his self-assertion that he's an expert)."

132 *[Tuvell]* See *e*129 *supra.*

133 *[Tuvell]* The sense in which the two lists are "totally different" is that they're based upon entirely different organizational principles, and hence are disjoint/incommensurable from one another (Marshall's "list" is very vague/handwavy, never addressing the real/complained-of issues in Tuvell's list):

Marshall's non-specific non-defamatory areas:

#1(℘6): Unrelated to libel/defamation.

#2(℘7): False, but not libelous.

#3(℘7): Opinion based upon disclosed facts.

#4(℘8): Unrefuted statements of fact.

#5(℘9): Mere insult.

#6(℘9): Mere inaccuracy.

Tuvell's specific defamatory categories ("Top Five Defamations"):

#1(℘27): Theft (attempted) of professional services.

#2(℘28): Started divisive thread of Left vs. Right.

#3(℘29): Website is single-issue, not Judicial Misconduct platform.

#4(℘29): Dishonest sandbagging.

#5(℘30): Abuse of blog for personal agenda; banning.

134 *[Tuvell]* Note that, in Massachusetts, "*Imputation* [without the requirement of successful *accomplishment*] of criminal conduct is defamatory *per se*." *McAvoy v. Shuffrin,* 401 Mass. 593, 597–598, 518 N.E.2d 513 (1988, emphasis added ; this case was already cited by Defendant in his Opp).

In this connection (and also in-line with the Judge's concern/respect for "hornbooks"), we note that the hornbooks generally support a **standardized list of four "defamations *per se*,"** as follows (languaged here by https://en.wikipedia.org/wiki/United_States_defamation_law, emphasis added; Wikipedia may comprise a "non-traditional hornbook," but it is accurate in this detail, as can be seen by consulting the traditional hornbooks):

(α) Allegations or imputations **"injurious to another in their trade, business, or profession."** [A.k.a. occupation or **vocation** = "calling/summons" = "grand purpose in life" (see https://en.wikipedia.org/wiki/Vocation), as Tuvell twice emphasized at oral argument, see ℘15,29 *supra.* The *"making-of-money"* aspect is not relevant in this regard, as that would get into a damages discussion, which is assumed/unnecessary in a libel-*per-se* jurisdiction generally, much less at Motion-to-Dismiss time. All that's involved regarding cause-of-action for defamation is the aspect of *injury to reputation.*]

(β) Allegations or imputations of **"loathsome disease"** (historically leprosy and sexually transmitted disease, now also including mental illness). [Such as **PTSD,** see *e*25,63 *supra.*]

(γ) Allegations or imputations of **"unchastity"** (usually only in unmarried people and sometimes only in women). [Not relevant here.]

(δ) Allegations or imputations of **criminal activity** (sometimes only crimes of moral turpitude). [Such as **"theft of profession services,"** see ℘27 *supra.* For which, see generally https://en.wikipedia.org/wiki/Theft_of_services, which explains that such theft of services constitutes a crime/misdemeanor/felony, typically prosecuted as larceny (this general Wikipedia reference — as opposed to legalistic citations to cases/treatises — being sufficient for our purpose here, which is to adumbrate the connotation of defamation in the mind of the audience).]

135 *[Tuvell]* Tuvell's point here — "provided that the underlying facts are true" — is precisely what the Supreme Court is talking about in the quotation taken from *Milkovich* in ℯ19 *supra.*

136 *[Tuvell]* Now seven, with more planned (see http://judicialmisconduct.us/CaseStudies).

137 *[Tuvell]* "Other stuff" such as an introductory short-course in-a-nutshell about the relevant legal laws/rules (http://judicialmisconduct.us/Introduction), a compilation of resources (http://judicialmisconduct.us/Resources), information about the logo (http://judicialmisconduct.us/About/Logo), and some forums (http://judicialmisconduct.us/forum, newly added since the events at issue in the instant case).

138 *[Tuvell]* Hence, defamatory *per se*. ℯ134(α) *supra.*

139 *[Tuvell]* Actually, Tuvell was here quoting (accurately) Rule 8.3(b) *ABA Model Rules of Professional Conduct.* The corresponding Rule 8.3(b) of the *Massachusetts Rules of Professional Conduct* states: "A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Commission on Judicial Conduct." It would have been inappropriate for Tuvell to quote the latter, because Judge Casper is a First Circuit Federal (not Massachusetts) judge, so the "appropriate authority" to be informed is the federal First Circuit Judicial Council (not the Massachusetts Commission on Judicial Misconduct).

140 *[Tuvell]* This cannot be accurate. It is information Marshall cannot possibly know, because the technology/tools ("Internet analytics") don't exist capable of providing it. (i) His "official" number of "2,000" may, perhaps, reflect some collection of "officially registered users" (in some unspecified sense, such as email subscribers, or RSS feed subscribers, or website accounts, etc.; though he claims 3,200 on his website, see Comp℘4¶5), but (ii) Marshall cannot possibly know how many of those "follow his website every day," because the technology doesn't support that. Marshall may, perhaps, know (via some Internet analytics tool his website uses) (iii) approximately

the number of visitors/sessions/pageviews (all different numbers) his website receives per day, but he cannot possibly know (iv) how many of those are amongst the aforesaid 2,000 registered users, or are unregistered users, or indeed are human at all (as opposed to automated bots/spiders). Finally, he cannot know (v) how many users actually "follow" his website (in the sense of actively read and pay attention to it, see *e*83 *supra*), as opposed to "idly let the words flow past their eyes, whilst daydreaming of other things."

141 *[Tuvell]* This is absurd/insane. Marshall is here saying, "opinion is not fact as long as the audience can check/investigate it and determine the truth of the matter." There has never been any such thing ever said in the whole history of defamation law. Indeed, just the opposite is true: statements that have the mere *potential/tendency* (as opposed to the "check-it-out-for-yourself look-up-ability") to defame are actionable. See also *e*143 *infra.*

142 *[Tuvell]* This is absurd (an invalid/nonsensical legal argument). To say "the website is single-issue," when in actuality it is not, is very obviously a false statement of fact (whose truth/falsity only a jury at trial is competent to decide, not a judge at Motion-to-Dismiss time). Marshall cannot immunize himself by pretending (as he does here at oral argument, though he did not do so at the time of events, see OppExhA) that "it's his opinion/analysis," because such "analytic error/falsity" is ineffective for avoiding defamation liability: see (i) the discussion concerning "I think"-like circumlocutions in *e*18 *supra,* and (ii) the discussion concerning "gross/inexcusable negligence/antipathy about truth/falsity" in *e*121 *supra.*

143 *[Tuvell]* The judge here picks up (falsely) on Marshall's absurd/insane theory in *e*141 *supra*. For the Judge to grant any credence at all to this invalid/nonsensical legal argument bizarrely returns to his obsession/bugaboo (see also *e*2,5,72 *supra*) about the "responsibility" of the "forum"/audience to somehow "avoid/thwart defamation," by exploring parameters/barriers around the "requirement and/or difficulty for *listeners/readers to investigatively determine the truth/falsity of a statement of fact.*"[†] That's crazy.

(i) While that may be mildly interesting as a theoretical discussion, it is

simply *not* a factor as an element of a cause-of-action for defamation generally, much less *(a fortiori)* at Motion-to-Dismiss time. Namely, it puts a new, never-before-heard-of, burden on the third-party listeners/readers of the defamatory material — whereas all the actual/known elements of cause-of-action for defamation involve only the two principal parties themselves (defamer and defamee). There is simply no requirement — at cause-of-action Motion-to-Dismiss time (as opposed to, in particular, jury-decision/damages time) — for considering the *actual* (as opposed to *potential*) impact of defamatory statements on the third-party listening/reading audience/community. Defamation law just doesn't work that way.[‡] A false statement of fact is a false statement of fact. Period.

(ii) Beyond the bogus addition of a third-party requirement to the cause-of-action (just discussed in item (i) *supra*), the *degree of difficulty* of determining truth/falsity is even further totally extraneous/irrelevant. For, the same discussion could be framed in terms of a listener/reader who has the investigative resources of the New York Times, or the FBI: "If you can eventually figure out, by hook or crook (*correctly,* considering "fake news!"), the truth/falsity of a statement of fact, then it's non-defamatory." And, it's not enough for just *one* listener/reader to possess this investigative capability — they *all* must have this capability. That's transparently ridiculous.

Example: Consider the various currently active high-profile defamation case involving Alex Jones (InfoWars), concerning the 2012 massacre at Sandy Hook Elementary School (Newtown, Conn.). Jones has published/promulgated "conspiracy theory" claims/"opinions" to the effect that the shootings/murders were an elaborately staged hoax, that the events/shootings/murders didn't occur, and affected family members were paid actors. Audiences can trivially research the matter, and discover that Jones is lying (Jones portrays himself as a "journalist questioning the narrative"). Obviously. (One newspaper headline reads: "Alex Jones's Attorneys Argue That No Reasonable Person Would Believe What He Says" (https://www.texasmonthly.com/politics/alex-joness-attorneys-defamation-suit-argue-no-reasonable-person-believe-says/).) So does that mean the defamation lawsuits against him should be dismissed? No. Obviously. (As judges in the cases

are currently in the process of ruling.) Reference (Motion-to-Dismiss; warning, IMHO: legalistic/double-talk shark-attack, see https://abovethelaw.com/2018/07/just-because-youre-defending-nazis-doesnt-mean-you-have-to-be-a-prick-about-it/): https://drive.google.com/file/d/1kxMDBH1QVV_tlceTsvrF1Jw_QVd14xAr/view.

{† • We're distinguishing here, of course, between (i) "audiences *already knowing* the truth of the matter *at (or before)* the time of events," and (ii) "audiences *hopefully searching-out* the truth of the matter at some indeterminate time *afterwards*." The former (i) is exempt from actionability (because "tendency/potential to harm reputation" does not reasonably occur, not even for an instant); the latter (ii) is not exempt (because "even 'temporary' tendency/potential harm" is still "tendency/potential harm"). The standard example of (i) is "inline cards-on-the-table side-by-side comparison," that is, where the facts upon which opinions/conclusions are based are *explicitly/immediately exhibited* in the course of the discussion itself — as opposed to an *unstated implicit/prospective* hope the audience will later "look up" out-of-band vague handwaving opinion-like generalities, which is what occurred in the case-at-bar (noting that **Marshall himself admits to not "looking up" the truth (a.k.a. "actual malice," *e*33 *supra*),** in his Diss℘4: "I did not check his website at first, nor did I read it.").}

{‡ • In this regard, recall (per *e*3,134 *supra*) that under Massachusetts law, "all libel is *per se*" (as opposed to *per quod*, see Comp℘17ƒ3 and Opp℘19ƒ15). The very instant a defamatory statement is uttered, defamation attaches — there simply is no concept of "waiting for awhile, then polling the readers whether they've scoured the Internet and determined (correctly!) the truth/falsity of the statement."}

144 *[Tuvell]* No, there was never any "suggestion that Marshall look into more Judicial Misconduct." Instead, Tuvell *assumed* from the beginning that Marshall had some interest in Judicial Misconduct (since it is a subspecies of Judicial Ethics), and offered up his own experiences (as documented on his own website) as fodder for mutual discussion by Marshall (as a friendly kindred spirit with some similar interests).

145 *[Tuvell]* Compare the “thirty-forty” mentioned earlier, in connection with *e*49 *supra*.

146 *[Tuvell]* No, Tuvell has never argued that they’re “completely” different. In particular Judicial Misconduct is a subspecies of Judicial Ethics (it is unethical to commit misconduct, obviously). But they are certainly significantly different/distinct, as discussed in *e*49 *supra*.

147 *[Tuvell]* Actually, I don’t know what Marshall is talking about here. To repeat yet again, the Comp makes no complaints about “mere insults” *per se* (only about their defamatory implications, see *e*18 *supra*).