Appeals Court of the Commonwealth of Massachusetts

№ 2018-P-1605

Walter Tuvell
Plaintiff/Appellant

v.

Jack Marshall
Defendant/Appellee

On Appeal From A Judgment Of The
Middlesex Superior Court (№1781CV02701)

BRIEF OF PLAINTIFF/APPELLANT

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Elements Of Cause-Of-Action For Defamation

"Hornbook" (so-called by the Judge at OATAnn℘3ℓ12 AplApx℘114; we cite *Restatement* §558, as languaged by *Sack* §2.1; see important discussion of these criteria at OATAnn℮3–5℘b–d AplApx℘150–152, including the fact that in Massachusetts the *first clause of item (δ) here* always obtains):

(α) A false[1] and defamatory statement concerning another.

(β) An unprivileged publication to a third party.

(γ) Fault amounting at least to negligence[2] 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.

MGL Ch.231 §93 (Retraction of Libel)

Defamation can be ameliorated by the defamer, but only if full retraction is proactively/provenly published seasonably with respect to Complaint being filed. *[Paraphrase.]*

1· The proper definition/meaning of the word "false" in the sense of defamation law is **Material Falsity** (℘23 *infra*). It is not the usual naïve/logical abstract/formal rigid/binary "yes/no." It's a specialized legal/real-world concept, incorporating not only the usual/strict **factual falsity,** but also/additionally ***contextually defamatory implication*** (as we've already introduced, via our abbreviation **CTXDEFIMPL,** in Opp and TblDefam). **Every single one** of the ~57 [see ƒ5 *infra* for the "~" notation] defamatory acts we've pled in Comp (and now restated in TblDefam) **is "materially false".**

2· Marshall's level of fault is generally 100% direct/intentional; but this negligence clause does come into play twice, at ℘31ƒ41 and ℘36ƒ50 *infra.*

NOTATION; ABBREVIATIONS

- ✔ **Comp** = Plaintiff's Verified Complaint.
  - **DGIMF** = "Disputed Genuine Issue of Material Fact" (i.e., fiction/falsehood/lie, in the context of defamation).
  - **CTXDEFIMPL** = "Contextually Defamatory Implication." See *Material Falsity* (℘23 *infra*).
- ✔ **TblDefam** = Comp's "~57" (ƒ5 *infra*) defamations, in tabular format (mentioned at OATAnn*e*17 AplApx℘154).
- ✔ **Diss** = Defendant's Motion to Dismiss.
- ✔ **Opp** = Plaintiff's Opposition to Diss, especially ✔ **OppExhA** = Opp Exhibit A (the blog at issue).
- ✔ **OATAnn** = Oral Argument Transcription, Annotated.
- ✔ **OpAnn** = Annotated version of **Op** = Opinion.
- *✔ = The above documents are all included in AplApx.*
- **ApltBrief** = Appellant's Brief (this very document).
- **AplApx** = Appeals Appendix, accompanying ApltBrief. (Referenced routinely herein per MRAP 16(e).)
- ℘,ƒ,*e*,ℓ = Page, footnote, endnote, line.
- †,‡ = In Comp and TblDefam (and hence where those are cited herein), these dagger symbols have a specialized meaning,[3] explained at Comp¶17 AplApx℘21.
- ",",',' (quotation-marks) = Verbatim quotation or paraphrase.[4]
- ↟,↟ = Footnote continuation on next/previous page.

3· In other documents, daggers regularly indicate inline-notes (embedded in footnotes/endnotes).

4· Verbatim quotations herein can be distinguished from paraphrases by context (or look-up), though there will be no occasion for confusion. This is standard usage, even in law. *For example:* The Supreme Court at *Milkovich* ℘18 attributes the literal metaphor "marketplace of ideas" to O. W. Holmes, *Abrams* ℘630; however that phrase originated only with W. O. Douglas, *Rumely* ℘56 (though even there it includes a space character between "market" and "place"). See https://en.wikipedia.org/wiki/Marketplace_of_ideas.

INTRODUCTION & ISSUES PRESENTED FOR REVIEW

Jack Marshall, the Defendant, is a craven, venal LIAR. What he did to Plaintiff Walter Tuvell in this case was intentional/focused/targeted/defamatory lying, through-and-through. "Toxic mendacity" is a fair/appropriate characterization ("Orwellian psychosis" may possibly overstate the case).

There was nothing legitimately/honestly "opinionated" about any of Marshall's cynical noxious LIES, in any sensible sense (despite what the Judge pretended), as (re-)proven herein. Amongst the ~57[5] defamatory acts pled/alleged in our Comp (and supported in Opp, and at Oral Argument, and now repeated/**proved** yet again here in tabular format in TblDefam), Marshall outright factually LIED ~29 times; while another ~32 times he uttered/wrote "materially false" pseudo-"opinions" <u>based upon (hence implying)</u> his earlier lies. Yet, the lower Judge's grant of Rule 12(b)(6) Motion-to-Dismiss ("failure to state a claim") falsely/blindly pretended Marshall's publications were "pure opinions, innocent as the driven snow, grounded solely upon true facts."[6] That was a blatantly false/wrongful breach of good-faith judging.

5· The "~" notation indicates some unavoidable overlap/duplication. The numbers given here are obtained by direct count of the key markers "†,Ⓛ,Ⓘ" in TblDefam.

6· Paraphrase; the literal quote is at ℘27 *infra.*

Therefore, **this Appeal now seeks reversal,** based upon the following six "big picture" main issues (with plentiful fine-grain details to back them up) argued herein:

I· Judges must never be permitted to *misapply/ignore* laws/rules in their decisions (provided they themselves *know* the laws/rules correctly, as proven by their own statements/citations concerning rules and binding precedent). In particular:

II· Judges at Motion-to-Dismiss time must *accept as true (for the purposes of the motion)* all reasonable factual allegations (in nonmovant/Plaintiff's Complaint, and at Oral Argument, and in Opp), and must draw all reasonable *inferences* therefrom in his/her favor.[7] In particular:

III· Judges, at Motion-to-Dismiss time in a defamation case: (i) must *not* blindly credit vague/tenuous/remote self-serving "blanket" disclaimers by Defendant of "pure/'meaningless'/non-factuality-based 'opinion';" and instead (ii) must actually *check* whether such claimed 'opinions' *really are* based on true/disclosed facts, or instead on **false and/or undisclosed defamatory facts (lies)**.

IV· The United States Supreme Court itself has univer-

7· In this sentence, the phrase "all reasonable" is a very weak filter (at Motion-to-Dismiss time), meaning only that "no sensible potential qualified juror could possibly think otherwise."

sally discredited/disowned the antique/outdated/unsophisticated theory of **“opinion”** as a methodology for analyzing defamation cases, and replaced it with the more rigorous/scientific **“material falsity”** standard, via the so-called **“*Milkovich* Test.”** Why hasn’t Massachusetts done the same thing? (It can/should/must.)

V· To ensure the integrity of the judicial system, judges, in all decisions they issue (published or not), must provide the public clarity afforded by valid principled *non-conclusory* reasoning —— as opposed to false/invalid pseudo/non-reasoning, or silently/abusively “skipping the intermediate logic” altogether.

VI· Judges must not publish absurd anti-litigant falsehoods in their opinions, because that publicly portrays the litigants in a false light, prejudicial to the litigant’s actual story/claims.

STATEMENT OF THE CASE

The events involved in this defamation case all occurred during Sat Aug 26 – Wed Aug 30 2017, in an online Internet **blogsite** ("Ethics Alarms") maintained by Defendant, witnessed by a large audience. Plaintiff demanded retraction/correction from Defendant, but received none.

Plaintiff filed Complaint **(Comp)** on Sep 13 2017.

Defendant filed Motion-to-Dismiss **(Diss)** on Oct 16 2017, including therewith exhibits containing the blog's **About** page (abridged, edited version) and **Policies** page.

Plaintiff filed Opposition **(Opp)** to Diss on Oct 25 2017, including therewith an exhibit appendix **(OppExhA)** containing the complained-of underlying defamatory blog communications (entire, verbatim).

Oral Argument[8] was held on Jun 7 2018, transcribed with annotations in **OATAnn.**

The Court's Opinion **(Op)** granting dismissal, annotated in **OpAnn,** was issued on Aug 13 2018.

This Appellant Brief **(ApltBrief),** with Appendix **(AplApx),** including a newly prepared Table of Defamations **(TblDefam),** now follow.

8· The audio recording (MP3 format) itself is available online at the Plaintiff's website, http://JudicialMisconduct.US. All other significant/relevant documentation related to this case are archived there as well.

STATEMENT OF FACTS

Over a remarkably brief period of only five days in August 2017, the Plaintiff was defamatorily attacked on by the Defendant on the latter's blogsite,[9] https://EthicsAlarms.com. Marshall's attacks were: (i) wholly unprovoked/unwarranted; (ii) entirely based on Defendant's **own factually false** statements (and his **opinions based upon them**); (iii) personally over-the-top/vicious; and (iv) provoked an in-kind "lynch-mob" mentality/reaction (which Marshall intended) by the blog's other commenters.

In Brief: Plaintiff "discovered" Defendant's blogsite, and thought it might be a good place to discuss various Judicial Misconduct (ethics-related) issues, as laid out on his own website (http://JudicialMisconduct.US). Preparatory to that (in an effort to learn if his topic would be appropriate/welcome), Plaintiff sent an innocent email to Defendant Marshall, ***privately,*** politely inquiring about the perceived "design-vs.-implementation mismatch" of his blogsite (that is, "studious/serious ethicist vs. political/partisan hack," though without evaluation/condemnation of "which is 'better,' Right or

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9· Internet defamation is often dubbed "cyberlibel" (closely affiliated with "cyberbullying," and in the instant case with "hate(ful) speech against (wrongly) perceived 'liberals'") —— though, there is nothing particularly online-novel about the case-at-bar. (For example, the infamous CDA 47 USC §230(c)(1) is not involved, because of the distinction between platform-provider and information-producer.)

Left"). But Defendant never replied. Instead, he falsely "slimed" Plaintiff ***publicly*** (on the blogsite), crazily launching an insane rant, lying/accusing Tuvell of being some kind of "liberal academic" (which Marshall obviously hated).[10]

Marshall's "poisoning" led to an escalation by his acolytes, from which Tuvell tried mightily to extricate himself, by (among other things) pointing to his own website, which explicitly carried the disclaimer/description, "This nonpolitical/nonpartisan/nonideological website" on its Home/landing page (http://JudicialMisconduct.US). But extrication proved impossible, because of the "gaslighting" ("false-fact") nature of the blogsite mob's attack-team.

In Detail: The full story, outlined above, is well-narrated in Comp℘4–15 AplApx℘9–20, to which we hereby refer; it is needless to go into further detail in this place. (Certain salient points will be introduced in context as needed, *infra,* with references to other documents mentioned in this Brief; see the section on NOTATION; ABBREVIATIONS *supra.*) The **actual verbatim content** of the

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10· Marshall's stated "reason" (at OppExhA℘8 AplApx℘85) for labeling Tuvell an "academic" was that Tuvell "attached his degree and *alma mater*" to his initial email (OppExhA℘7 AplApx84). But that stated "reason" was a farcical lie, because Tuvell himself thereat *expressly stated his true/exact reason* for attaching his degree and *alma mater* —— namely, to certify he was "not-a-crank" (OppExhA℘7 AplApx84).

blog interaction is contained in the record as an exhibit, OppExhA,[11] which this Appellate Panel is implored to consult them at this time, at least for a brief scan, as it is obviously vitally important to this Appeal.

SUMMARY OF ARGUMENT

Our argumentation will proceed, in separate sections *infra,* point-by-point through the six items I–VI listed in the section on INTRODUCTION & ISSUES PRESENTED FOR REVIEW *supra.* Since those six thematic items have already been voiced as complete sentences/thoughts, it would be redundant/tedious to re-elaborate upon them in the instant section, and then yet again once/twice more in the ARGUMENT and SUMMARY & CONCLUSIONS; CONJECTURES; FINIS sections *infra.* So instead, we shall now proceed without further ado directly to the following ARGUMENT section.

11· It is not a *requirement* to submit such "evidence" at Motion-to-Dismiss time, but it is *permitted,* and Plaintiff did so, to thwart any potential "Twiqbal/plausibility" attack by the Judge (which the latter mentioned briefly at Op℘2 AplApx℘184; see https://en.wikipedia.org/wiki/Twiqbal). In the event, Op mounts no such attack.

ARGUMENT

This ARGUMENT section elaborates upon the six items I–VI listed in the INTRODUCTION & ISSUES PRESENTED FOR REVIEW section *supra.*

I· Judges Must Apply The Applicable Rules/ Laws Correctly (Presuming They Know Them)

The Judge below correctly cited the applicable laws/ standards he was bound to follow (Op℘2 AplApx℘184); thus there is no question he knew what he was required to do. But then he didn't actually do so, in respect of the two points in the two paragraphs which now follow.

Wrongly, The Judge Didn't Credit Plaintiff/Nonmovant's Facts/Inferences. The Judge correctly observed (Op℘2 AplApx℘184, citing *Fairneny et al.*) that the Court **must credit** all of Plaintiff/nonmovant's factual allegations, and all reasonable inferences therefrom. But he **didn't apply** it. We defer the whole discussion of this topic to the next section, II· Judges At Motion-To-Dismiss Time Must Examine/Credit All Reasonable Facts And Inferences To Nonmovant's Benefit *infra.*

Wrongly, The Judge Did Credit Defendant/Movant's Facts/Inferences. The Judge correctly observed (Op℘2 AplApx℘184, citing *Schaer et al.*) that the Court *may "consider,"* not only the formal Complaint document under challenge, but also other documents, adequately noticed

by the parties, whose authenticity is undisputed. This is applied (properly) to the verbatim transcript of the blog session at issue, OppExhA AplApx77–111 (submitted by Plaintiff, and stipulated accurate by Defendant at OATAnn℘11ℓ13 AplApx℘122). The problem is that the Judge then proceeded to "consider" OppExhA in forbidden ways.

Namely, the Judge here has gone beyond his charter, by going so far as to *ignore* Plaintiff's original Comp, and instead himself substitute/parse/evaluate/weigh OppExhA, usurping the jury's function/prerogative, to ferret-out/cherry-pick with a jaundiced eye only those portions of OppExhA which allowed him to reach his false conclusion —— paraphrased as "everything Marshall said/ wrote was 'pure fact-free/true-fact-based opinion,' hence non-actionable" (complete non-paraphrased version quoted at ℘27 *infra*).

To say that *authenticity* of OppExhA is undisputed (as it is), is not the same as saying its *meaning* is undisputed. The Judge put blinders on himself, reading Marshall's writings *in abstentia* of the factual context (Tuvell's writings/arguments, in OppExhA/Comp/OATAnn/ TblDefam) in which they were written, and thereby falsely "deciding" Marshall's writings were "just opinion." That's just plain false/wrong. He can't be permitted to do that.

II· Judges At Motion-To-Dismiss Time Must Examine/Credit All Reasonable Facts And Inferences To Nonmovant's Benefit

Our biggest single gripe (arising over and over) concerns **undisclosed and/or false defamatory facts (lies)**: The Judge decided (wrongly), as a global/generalized whitewash/handwave (℘29 *infra*), that all of Marshall's complained-of statements were "opinions based upon disclosed true facts" (which renders them non-actionable). The problem is, that's just plain flatly false, upon any fair (i.e., unbiased) reading of Comp+OppExhA+OATAnn+TblDefam.

Instead, what is true (and it suffices to thwart Motion-to-Dismiss) is this:

- Plaintiff properly pleads otherwise (in Comp/OATAnn/TblDefam), and truly so (Verified Comp). Namely:
- Marshall's complained-of statements were either:
  - **false fact-statements (lies);** or else
  - **<u>opinions</u> <u>based</u> <u>upon</u> false and/or undisclosed defamatory fact-statements (lies).**

To be completely specific: The Plaintiff pled ~57 "short and plain" allegations of defamatory statements. Therefore, the Judge was required to examine **each/every one of them, individually,**[12] for "failure to state a

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12· *Schaer* ℘478 (emphasis added): "We therefore review **<u>each</u> factual allegation …**" *Scholz* ℘249 (emphasis added): "The moving party bears the burden of demonstrating the absence of a triable issue of fact on **<u>every</u> relevant issue.**"

claim.” **He failed miserably to do so** (he just vaguely handwaved instead).

The Judge’s rationale/“explanation” for dismissal —— quoted at ℘27 *infra* (and which is exhaustively analyzed/critiqued/thwarted in Plaintiff’s annotations at OpAnn℘f–v AplApx℘205–221) —— amounts to a global whitewash, in the sense that it doesn’t really explain anything. In other words, he just made-up the preordained answer he wanted (“all pure opinion”), and from that point on ignored (“didn’t hear”) the Plaintiff’s actual story. (This “global whitewash” aspect is addressed *infra* in the section on V· Judges Must Provide Clear Non-Conclusory Reasoning For Their Opinions (With Examples/⋆Proofs⋆)). Judges cannot (must not be permitted to) do that.

III· Judges, At Motion-To-Dismiss Time In Defamation Cases, Must Require Clear/Immediate/Local Context/Audience Notice Over Vague/Tenuous/Remote “Blanket” Disclaimers

The Judge’s main reason for dismissal (the whitewash, see ℘29 *infra*) mainly supports the idea that Marshall’s defamations are covered under “the ‘opinion’ exception.” We address that now (notwithstanding that “opinion” is not even the right/modern standard to be using, a topic addressed *infra* in the section on IV· Why Doesn’t Massachusetts Honor The Supreme Court’s MATERIAL FALSITY Touchstone?).

Consider honest/reasonable opinions (as opposed to the fake/malicious pseudo-“opinions” Marshall purports to peddle here). If there’s any reasonable chance the audience might misinterpret the author’s intent (in intending to publish opinion-statement, as opposed to fact-statement), a reasonable/prudent author will/must preface their communication with a disclaimer notice, advertising the conditional/opinionated nature of their comment. This is a well-accepted ritual of social interaction.

But such a disclaimer must be a *reasonable* attempt to bring actual/adequate notice to the audience’s attention, **within the context** of the opinion/communication itself (which can include implicit context, but only if *reasonably* well-understood by the audience under the circumstances). What’s *un*acceptable/*un*reasonable is for a publisher to mumble vague somethings about opinions at some remote time/place well beyond the present mind-set/attention of the audience, and then pretend to assume it applies universally in perpetuity. Such “blanket” disclaimers may work for lawyers in the strict confines of formal contract law, but they don’t work for the real-world ordinary-people social contract. It’s just not **reasonable.**[13]

13· *Scholz* ℘252 gives us a perfectly fine instructive example of “reasonable remoteness/proximity of cautionary language” —— namely, “the span between an article’s *headline* and its immediately ensuing *content body*.”

Namely, Marshall's statements are NOT "opinions(-as opposed-to-facts, in the context of defamation law)," because they do not pass the Supreme Court's ***Milkovich* Test** (a.k.a. "test for implied/communicated-assertion-of-material-factuality, absent strong mitigating/repudiation notice") (quoting *Milkovich* ℘2,21 here, *mutatis mutandis,* emphasis added):[14]

> ***Milkovich* Analysis/Test (for opinion-vs.-fact in defamation law):** A reasonable factfinder could conclude that the statements in the [Marshall posts] **imply an assertion** that [Tuvell] [committed bad acts]. [Marshall's posts] did not use the sort of loose, figurative, or hyperbolic language that would **negate the impression** that [Marshall] was **seriously maintaining** [Tuvell] committed [bad acts]. Nor does the [posts'] general tenor negate this impression. In addition, the connotation that [Tuvell] committed [the acts] is **sufficiently factual** that it is susceptible of being [objectively] proved true or false.

A quick scan of Marshall's About and Comment Policy pages, quoted next,[15] reveals them to give nothing but in-

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14· Per this ***Milkovich* Test,** the relevant **context** is determined by local/on-the-ground situational awareness —— not by some remote/long-forgotten generic disclaimer. So Marshall's (and the Judge's) pointing-to his About/Policy pages is bogus (too remote from the situation as it evolved) —— noting that Marshall's **very remote** About/Policy Pages **were even *much more* distant** than the defamer's disclaimers in the *Milkovich* case (and the Dissent in *Milkovich* militated for this, but lost anyway, correctly).

15· These were submitted (with some editorial changes by Marshall) to the lower Court as Diss Exhibits 1–2 AplApx℘50–55.

nocuous/vanilla remarks about opinion.[16] In fact, Marshall himself emphasizes (by added boldface, in Diss Exhibit 1) the "notice-of-opinion" clauses that he himself considers "prophylactic/inoculating," which we quote here *in toto* (non-boldfaced, though we add our own emphasis), but they do nothing of the sort (in fact, they do the **opposite**):

> Although I will frequently discuss issues involving law and the legal system, none of the opinions here should be taken as legal opinions, because they aren't. … I will usually make strong statements and espouse definite positions in the posts here. The objective isn't to be "right," though <u>if I post an opinion, I believe it</u>. … I don't need you to agree with me; there are often many legitimate ways to judge an ethical problem. I do need you to follow the Comment Policies. Check them out, please. … Like the Scorecard, Ethics Alarms is dedicated to starting discussions, not ending them, despite the tone of certitude that often invades its commentary. … This blog takes positions, attempting to be bold <u>without being reckless</u>. <u>When there is an error or misstatement,[17] I will correct it. When I am wrong, I will admit it. When I have made a mistake, I will apologize for it.</u>

There's absolutely nothing here approaching the kind of clear notice that a satirical/parody[18] website might

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16· Let's be clear here: Marshall's claim that his writings in this case are "nothing but 'opinion'" are really "laughably fake pretense."

17· The reference here is to "error/misstatement of fact," as opposed to "change-of-mind of opinion." Thus, Marshall admits he does speak about some facts, not opinions only. If Marshall hadn't believed in the *factuality* of his defamations about Tuvell, he wouldn't have banned him.

18· For which, see e.g. *Gutterman.*

give, to the effect that “nothing we say here can be taken seriously, because we don’t even take ourselves seriously.”[19] Yet what he’s pretending to do in the case-at-bar is leverage his vanilla About/Policy pages to the level of all-singing/all-dancing immunization/inoculation of all his blog postings, once-and-for-all-time, against defamation liability. (And the Court swallows his argument.)

That’s absurd/false, for at least two reasons: (i) The intent of Marshall’s About/Policy pages discussion about “opinion” is obviously geared (as it should be) to the standard “marketplace of ideas” sincerely discussed (albeit perhaps roughly-and-tumbly) on typical Internet blog/comment sites (as opposed to crazed right/left-wing-nut sites, which Marshall claims his is not). That is, there is no intent (as there shouldn’t be) to disclaim liability for unwarranted personal invective of the kind Marshall doled out against Tuvell (“unfair comment”). (ii) The About/Policy pages notice is simply too far/remote from day-to-day concerns/interactions of readers/commenters to provide adequate/**reasonable** notice.[20]

19· See https://en.wikipedia.org/wiki/List_of_satirical_news_websites for a list.

20· Marshall’s foolish pretension that he did mumble something about “mere opinion” in the course of the case-at-bar is scotched at OATAnn℮24–25 AplApx℘158–159 (namely, he really only applied his “this-is-only-opinion” rot with respect to his obnoxious mockery of Tuvell’s PTSD —— which was literally “hate speech,” https://en.wikipedia.org/wiki/Hate_speech).

And, oh yes, here's a third good reason Marshall's opinion defense (and the Judge's swallowing it) is absurd: (iii)[21] All (each and every one) of Marshall's so-called "opinions" were **not even eligible** for protection (which is to say, *not* "based upon disclosed true facts"). That's because his self-proclaimed "opinions" were all actually based upon **undisclosed and/or false defamatory facts (lies).** This is properly pled (which is what matters at Motion-to-Dismiss time) in Comp (replicated in TblDefam) —— in a manner that **provably** avoids the "conclusionary exclusion" (which the Judge mentions in passing at Op℘2 AplApx℘184, citing *Schaer*), because any casual perusal of OppExhA **objectively proves** so (that all of Marshall's "opinions" are based on **undisclosed and/or false defamatory facts, i.e., lies**).

IV· Why Doesn't Massachusetts Honor The Supreme Court's MATERIAL FALSITY Touchstone?

Historically (that is, pre-*Milkovich,* 1990), the theory of "opinion" has played a major —— and confusing/debilitating —— role in the law of defamation. At our oral argument, the Judge made it clear his personal main concern was about "opinion" (OATAnn℘3ℓ19 AplApx℘114). For that reason, Plaintiff and Defendant were obliged/required to concentrate their attention on the topic of

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21· This is the brunt of the section on II· Judges At Motion-To-Dismiss Time Must Examine/Credit All Reasonable Facts And Inferences To Nonmovant's Benefit *supra.*

"opinion" at oral argument, and extensive discussion of "opinion" is presented in OATAnn (both body and annotations).

However, the law advances (just as does any other technological/intellectual endeavor). Nowadays, "opinion" is the wrong tool for defamation law:[22]

> No task undertaken under the law of defamation is more elusive than distinguishing between fact and opinion. … This classic formula, based as it is on the assumption that "fact" and "opinion" stand in contrast and hence are readily distinguishable, has proven the clumsiest of all the tools furnished the judge for regulating the examination of witnesses. *It is clumsy because its basic assumption is an illusion.*

That is: All the historical/ancient "opinion-vs.-fact" legal thinking was inadequate. It has now been obsoleted/updated (compatibly, i.e., without invalidation/negation), by the Supreme Court, which has substituted a much more workable methodology ("way to think about it"). Naked (context-free) "opinion" simply isn't a "thing" any more.[23] It's been replaced[24] by a more ***contextually based***

22· *Sack* §4.1 (emphasis in original, internal cites omitted).

23· Said another way: If any observers (such as lower courts) thought that an "opinion privilege" existed pre-*Milkovich* (though the Supreme Court had never said that), then *Milkovich* definitively disabused them of that misconception.

24· "Replaced" here means that in place of the superficial *a priori* rigid opinion-vs.-fact bipartite/dichotomy classification-based approach, *Milkovich* advocates a compati- ⇟℘23

analytic definition of defamation, called **"Material Falsity"** (coupled with the *Milkovich* Test, *supra*),[25] defined like this (in our wording):[26]

> **Defamatory Material Falsity:** The contextual[27] capacity/likelihood/propensity/potential[28] of a statement/communication to imply/convey/induce/

↕℘22 ble but much more deeply searching flexible objectivity/verifiability-based approach.

25· Via *Air Wisconsin v. Hoeper,* which is linked to the lead case, *Milkovich,* via the intermediary of *Masson,* the latter likening "materiality" to "substance/gist/sting," and also stating that "materiality is the sort of mixed question of law and fact that has typically been resolved by juries" (internal quote-marks omitted). "Material falsity" isn't an "all-brand-spanking-new-fangled thing." It's just a compatible/incremental refinement/improvement on methodology/worldview/*weltanschauung* —— an explication/repackaging of the *Restatement's* first element (℘4α *supra,* especially the word **false** occurring there), highlighting the *(already-incorporated) factor of contextual implication* (what we call CTXDEFIMPL, ℘5 *supra*). Anent, we hereby now *import* the discussion at OATAnne18℘f–i AplApx℘154–157.

26· The take-away here being the **shift of focus/emphasis, away from** the utterer/author, **towards** the utterance/communication itself, and its (potential) effect on the audience. That is, **away from** the defamer's transmission/intention (which can be, and typically is, amorphously/cynically "faked" *ex post facto*), **towards** the audience's reception/interpretation (which is much more tractable). In the instant case, some audience members *did actually* interpret Marshall's lies as fact-statements (as any casual perusal of OppExhA easily **proves:** e.g., ⋆ƒ54 *infra*⋆).

27· (i) **"Context Matters"** (*BNSF v. White* ℘69). In a defamation case, context includes signs/signals of the speaker's nuanced meaning (as to "binary"/bald opinion vs. assertion of fact), which may or may not be sufficient to put the audience on reasonable/adequate notice. (ii) At Motion-to-Dismiss time, **the judge must award all arguably reasonably (see ⋆ƒ54 *infra*⋆) "close-calls" to nonmovant**: "Whether a statement is a factual assertion or an opinion is a question of law *[only]* if the statement **unambiguously** constitutes either fact or opinion[;] and [otherwise] a ↕℘24

> connote/insinuate actual/factual falsity, diminishing of another's reputation, in the minds of the relevant audience.

Whereas the vague concept of "opinion" has had a polluting effect on the defamation landscape since time immemorial (dickering about whether the defamer more-or-less waffled about factual content), the clarity of "material falsity" has the cleansing effect of cutting through the fog to the heart of the matter (likely effect on the reputation of the defamed to the audience).

With the sharp/fine/clean/precise/logical tool of material falsity in place of the dull/coarse/blunt/vague/muddled/emotional instrument of opinion, all defamatory circumstances become much easier to analyze accurately. Since material falsity is now The Law (with Supreme Court imprimatur), it's the way things should/must now be done.

But that's not what the Judge below did in our case. He abjured material falsity (never mentioning it, or even *Milkovich,* anywhere, at oral argument or in his Opinion),

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⁑℘**23 question of fact** [for the jury] if [the statement is ambiguous, i.e.,] the statement reasonably can be understood **both ways**" (*Scholz* ℘250, emphasis added, citations and internal quote-marks omitted).

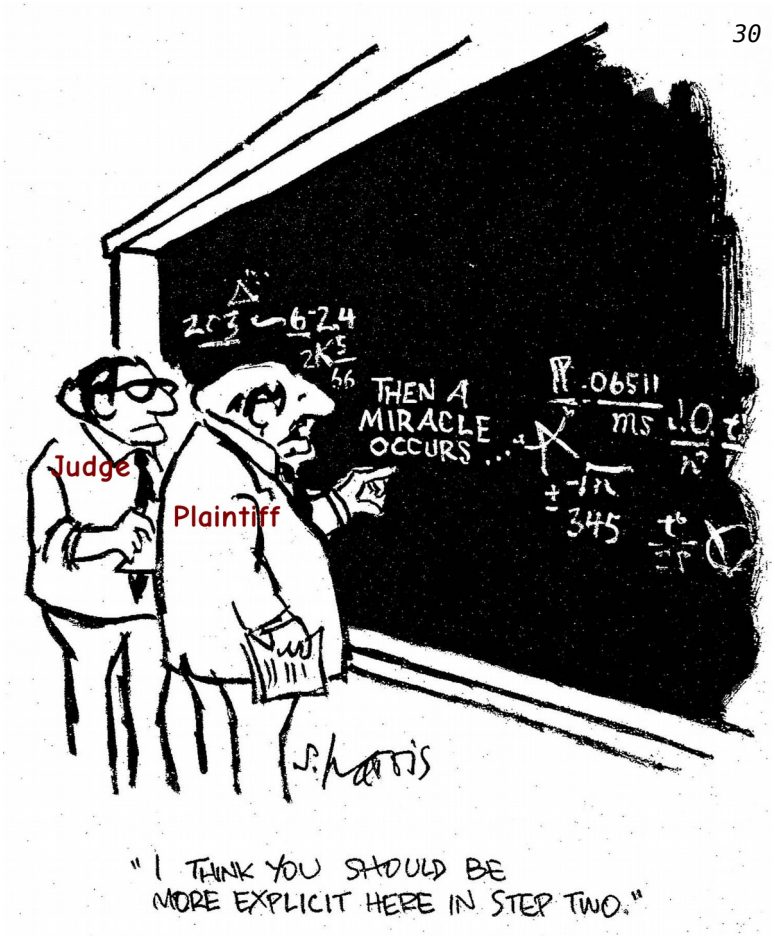
28· In the case-at-bar, this characteristic of "(reasonable) potentiality" need not be belabored, because any casual perusal of the evidence itself (the blog stream, OppExhA) reveals that Marshall's invective directly did indeed generate the *actuality* (hence *a fortiori potentiality*) of much false reputational damage against Tuvell, in the reactions/responses of the audience members (e.g., ⋆ƒ54 *infra*⋆).

and instead harped obsessively on his sacred talisman/ tin-goddess of “opinion” instead. He’s wrong to do so. In particular, he never even once considered/mentioned (as he should have) the *implications* of objective fact that “opinions” have.[29] And so he came to wrong conclusions.

Why? Why does Massachusetts permit this? It shouldn’t. If Massachusetts had honored “material falsity” —— and the Judge used that touchstone instead of “opinion” —— justice could have been served. As things stand now, justice has been disgraced, by “dissing” the Supreme Court (and all the public/citizens who believe/ rely on what their law says, such as the instant Plaintiff).

29· “[E]xpressions of ‘opinion’ may *often* [and *do often*] **imply [CTXDEFIMPL]** an assertion of objective fact.” —— *Milkovich* ℘18 (emphasis added).

V· Judges Must Provide Clear Non-Conclusory Reasoning For Their Opinions (With Examples/ ⋆Proofs⋆)



30

"Conclusioriness"[31] — a.k.a. "silent/unsupported handwaving,[32]" jumping to conclusions without adequate foundation/explanation/details, "skipping the intermediate logic," etc. — is anathema (a "joke") to rational

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30· © Sidney Harris; http://ScienceCartoonsPlus.com.

31· "Expressing a factual inference without stating the underlying facts [and/or chain of inferential reasoning] on which the inference is based [a.k.a. ***⋆proof⋆!***]." — *Black's Law Dictionary.*

32· https://en.wikipedia.org/wiki/Hand-waving.

human beings of all stripes, to scientific/intellectual endeavor generally, and here to the law especially. ⋆**Proof**⋆ is the lifeblood of the law (just as it is for mathematics, Plaintiff's specialty). Otherwise, mindfulness remains muddled in the mire of metaphysics. "The Truth (or God, or Devil) Is In The Details."[33]

In the case-at-bar, the nub of the Judge's writing cannot be taken seriously by anyone serious. His reasoning can be boiled down to nothing more than trivial/superficial (and false) broad-brush silence/mumbling/hand-waving ("then a miracle occurs …," *supra*), without providing any secure/sincere analysis.

To ⋆**prove**⋆ this, we quote here the *full extent*[34] of the pseudo-"reasoning" upon which the Judge's wrongful decision relies, wherein we highlight/comment upon the Judge's **two core lapses/falsehoods:**[35]

> As for Marshall's Comments, those statements likewise cannot serve as a basis for Tuvell's defamation claim because they **can only**

33· Traditional aphorism. See https://en.wikipedia.org/wiki/The_devil_is_in_the_detail.

34· Here, the Judge's single run-on paragraph of "reasoning" (spanning Op℘15–16 AplApx℘197–198) has been rearranged into subparagraphs, with footnotes and citations/gloss indicated by "…" but omitted (because they're *non-sequitur* with respect to the instant case, *a propos* of nothing), and emphasis/comments added.

35· For a more detailed discussion, we animatedly refer to our important associated annotations, at OpAnn℘f–v AplApx℘205–221.

be reasonably understood as expressions of opinion rather than fact. [BUT THIS IS PATENTLY FALSE: It *silently ignores* Marshall's ~29 explicitly indicated false/lie defamatory fact-statements; see also ƒ27 *supra* regarding "close calls" (though nothing in the instant case is very "close").] [Therefore the remainder of what the Judge has to say on this point is a nullity:] Given the language Marshall employed and the medium in which Marshall's statements were made —— a personal blog where Marshall shares his views on ethics, politics and other matters, his remarks about Tuvell's email, comments, Judicial Misconduct USA website, and lawsuit against IBM plainly expressed his opinions. …[36]

Furthermore, these opinions were **based on disclosed information. [BUT THIS IS PATENTLY FALSE: It *silently ignores* Marshall's ~32 explicitly indicated "opinions" that were based on false/undisclosed defamatory fact-statements; see also ƒ27 *supra* regarding "close calls" (though nothing in the instant case is very "close").] [Therefore the remainder of what the Judge has to say on this point is a nullity:]** Tuvell's email and comments were in the comment section when Marshall made these statements, as was a hyperlink to Tuvell's website, which discusses his lawsuit against IBM.

36· Regarding Op's footnote/citations here: At Op℘15 AplApx℘197, the Judge cites *Scholz* for the proposition that "statements made in an entertainment news column indicated they were opinion." That is a false proposition (obviously some statements in entertainment news columns can be statements of fact; comparable to a sports column, which is exactly what *Milkovich* was!). Besides which, any sane reading of the publications in dispute in *Scholz* (available as Exhibits B–D of that Complaint, available at http://www.thirdstage.ca/boston/download/download_legal.php?f=2010-03-10-boston_herald_lawsuit.pdf) easily shows they cannot reasonably be interpreted as defamatory false statements of fact as to Scholz ("objectively verifiable/falsifiable facts of/concerning Scholz"). That was the real reason for dismissal in *Scholz,* but it's not so for the instant case-at-bar. So the Judge's citation to *Scholz* is falsely *in apropos.*

> Marshall's readers, therefore, **were fully aware**[37] of the basis for Marshall's opinions on these topics and were able to assess whether Marshall's opinions were warranted. …[38]
>
> Accordingly, because the statements are nonactionable opinion, Tuvell cannot prevail on his defamation claim in so far as it is based on Marshall's Comments.

The Judge's silence/falsity here is what we call his **Global/Generalized Whitewash/Handwash**. It is conclusory/false/unacceptable.[39]

And it's just plain blatantly false. For, far from being "*only* understandable as opinion," there are **at least five other** perfectly reasonable/viable (and *equally-as-or-even-more likely*) ways (and combinations of them) to "understand" what Marshall did (as defamation, other than "protected/honest 'opinion'") —— and therefore

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37· Nothing could be further from the truth! This imposes an unreasonable burden on the audience (to affirmatively conduct a diligent/laborious web-search for further information) that has never heretofore been imposed upon an audience in a defamation case. The audience, being "only human," must be assumed to be "more-or-less 'lazy'." For further elaboration of this point (the Judge's bizarre theory of "responsibility of the forum"), see OATAnn℮141,143 AplApx℘179–181, please.

38· The Op's citation to *Scholz* here is no more *apropos* than discussed in ƒ36 *supra.* Regarding Op's insipid footnote at Op℘16ƒ9 AplApx℘198 here, see the paragraph on the Judge's false portrayal of Marshall's insults at ℘39 *infra.*

39· In order for the Judge/Courts to convert this invalid whitewash into valid ⋆**proof**⋆**/non-conclusory** status, what's needed/required is **detailed responses** —— true **explanations** —— of **exactly why** (with explicit references to OppExhA) **each/every one** (ƒ12 *supra*) of Plaintiff's ~57 claims (in Comp and TblDefam), **individually**, are defamatory or not.

the Judge *must* rank these interpretations *above* Marshall's "opinion" defense (by the section on II· Judges At Motion-To-Dismiss Time Must Examine/Credit All Reasonable Facts And Inferences To Nonmovant's Benefit *supra*), instead of whitewashing them, as he did do:

- Blind animus towards (falsely) perceived "academic/liberal/Democrat." (This and the next item are the **most likely scenarios.**)
- "Lib-trolling," just for "fun" or "the hell of it." This is similar to the preceding item, except that Marshall didn't actually/actively/truly believe in Tuvell's "academicism/liberalism," but just pretended/lied to.[40]
- Desire to support/defend/cover-up judges guilty of Judicial Misconduct, because that helps generate more wealth for unscrupulous/unethical lawyers (such as Marshall).

40· This explanation might seem unthinkable to sane people, but it's an entirely plausible theory in Marshall's case. See *Marcotte* (Exhibit A, ℘47 *infra* —— which we exhibit here because it employs language Marshall understands: it uses the label "conservatives" in the same way as Marshall's crazed use of the label "liberals" at OppExhA℘1–2 AplApx℘78–79). *Even if* Tuvell *were* some kind of "raging flaming liberal" (he isn't, of course, instead he's steadfastly "non-label-affiliated," including non-affiliation with the "No Labels movement"), Marshall's lies/defamation would *still* be illegal/actionable, **no matter what he "thinks/opines"** —— because he **lies factually defamatorily,** and *lying trumps opinionation,* per the Milkovich Test (℘18 *supra*).

- Simple/innocent/non-malicious error/misperception/misunderstanding. This possibility isn't as feasible as the preceding possibilities, because Marshall has refused/waived to make/correct this claim, *twice:* (i) Tuvell's demand letter (℘9 *supra*); (ii) response-to-Complaint (MGL Ch.231 §93, ℘4 *supra*).
- Too ignorant/stupid to understand what Judicial Misconduct (properly so-called) is even about.[41]

The Judge must not be permitted to commit such whitewash. Instead, what the Judge/Court is bound to do is sincerely/diligently *analyze and explain/*⋆***prove***⋆ —— in clear/convincing terms —— exactly w*hy each/every*[42] claim of defamation in Plaintiff's Complaint (all ~57 of them, no cherry-picking) is "mere pure fact-free opinion." He does not do that. (And he cannot.)

To assist/guide such a nontrivial/sincere analysis, this Appeal is accompanied by a new *table* of Comp's defamatory statements, **TblDefam** (which is admissible, as it does nothing more than re-state the Comp's claimed defamations, but presented in easier-to-digest tabular format). The *only way* the Judge/Court can fashion a satisfactory conclusion/opinion is to stoically march

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41· True or not, this is actually one of Marshall's own self-proferred traits (OATAnn℘33ℓ18–19ℯ146 AplApx℘144,182). And if so, it implicates Marshall of **incompetent/reckless negligence,** which amounts to actionable defamation (℘4γ *supra*).

42· See, e.g., ƒ12,39 *supra.*

through each/every[43] row of TblDefam, supplying *detailed reasons* why (or why not) the defamations named there fail (or succeed) in meeting the criteria of DGIMF and/or CTXDEFIMPL. Summary/breezy(/false) handwaving doesn't cut it. Plaintiff has studied these defamations from every angle he can conceive, and fails to understand *why* any of them are dismissable. (And indeed, they *are not.*)

The remainder of this section now presents *four very explicit counter-examples, with rock-solid* ***⋆proofs⋆,*** to the Judge's falsified "opinion-only" ruling.[44]

The "Linking" Defamation

To *illustrate* the kind of analysis a thoughtful/principled Judge/Court must undertake, let's consider the **simplest example** (out of ~57), namely Marshall's **linking defamation**[45] (item †14Cd in Comp/TblDefam): "… initially with a link in a comment to another commenter, causing me

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43· See, e.g., ƒ12,39 *supra.*

44· See also the similar "Five Top Defamations" Tuvell rattled off to the Judge at OATAnn℘17,27–31 AplApx℘128,138–142 (plus their associated endnotes/annotations).

45· Without more (i.e., *out-of-context*), this particular example may not seem "defamatory" in-and-of-itself. But *in context* it is certainly part-and-parcel of Marshall's over-all reasoning in banning Tuvell (he explicitly relied upon it), and as such it does *imply* defamatory behavior, hence it is defamatory itself.

to miss it …"[46] The Judge below has (silently) "decided" (as part of his global whitewash) this statement is an "opinion." But it is not: it is *obviously* a statement of fact,[47] and it's defamatory (it "caused Marshall to miss it [in some nefarious way, by context]," according to Marshall himself). Furthermore, it is *trivially* ***⋆provably⋆ objectively*** *false:* for otherwise, the alleged link would have to appear in one of Plaintiff's 10 posts/comments (in OppExhA).[48]

Where, pray tell, did it appear?

Nowhere (as any casual perusal of those 10 **objectively ⋆proves⋆**). It doesn't exist. It didn't happen. It's a completely false fabrication. Marshall made it up. He lied. Period. (Over and over and over again, *passim*).[49]

46· The links that Tuvell did provide (in his blog posts at OppExhA℘7,10,13,32,33 AplApx℘84,87,90,109,110) were not "to another commenter," but rather to Marshall's or his own website, or to Wikipedia —— hence of course could not possibly have "caused him to miss" anything as he falsely pretends/lies.

47· Because it *does* "contain objectively verifiable/[falsifiable] facts" (*Scholz* ℘250, internal quotes omitted).

48· Alternatively, perhaps Marshall was referring to some *undisclosed* out-of-band fact/communication, not enclosed in OppExhA? (But that would be actionable too, of course.)

49· And this is kind-of the point, isn't it? *All* of Tuvell's posts/comments are subsumed in just that tiny/closed/finite/bounded universe of 10 (conveniently listed on the first page of OppExhA, which is unnumbered but can be referred to as "OppExhA℘0" AplApx℘77) —— **which can be trivially surveyed/checked by exhaustive search.** It is unconscionable for the Judge below to refuse to undertake that trivial effort, and instead blindly/unthinkingly dismiss a (that particular) claim of defamation.

The “Precise Issue” And “Sandbagging” Defamations

As an intermediate example, we consider Marshall’s **“precise issue” defamation** (item †12 in Comp℘6/TblDefam℘1 AplApx℘11,24). Tuvell had written (OppExhA℘11 AplApx℘88):

> The whole partisan politics thing is tiresome/boring, and I have no dog in that fight. I just don’t care about the whole ‘I-am-not, you-are-so scene,’ from any direction. Silly.

To which Marshall responded (OppExhA℘11 AplApx℘88):

> If it is silly, then why did you choose that precise issue to begin with?

But Tuvell did no such thing! Marshall is flat-out/whole-cloth lying, defamatorily, about a factual matter.

What’s true instead is this: Tuvell’s *earlier/previous/initial/**private*** email to Marshall made a *polite/**private** inquiry/observation* (not an “issue” for public debate on Marshall’s website) along those lines, which Marshall claimed/pretended to **misinterpret** as an “accusation” (“issue”) —— to “poison the well.” **BUT** that **pretension/misconception had already/previously been definitively cleared up by Tuvell’s very first *public* comment/post to the blog** (OppExhA℘7 AplApx℘84), wherein he plainly/expressly stated his only concern, thusly (boldface added, but capitalization in original):

> I maintain a website documenting a major cultural/governmental (but not ‘political/partisan’) phenomenon affecting many thousands of Americans yearly, namely Judicial Misconduct (http://JudicialMisconduct.US). **THAT’S the sort**

> **of thing I wonder what a[] non-political/partisan (though legally trained/savvy) ethicist thinks about.** Start, say with the 'Smoking Gun' at http://JudicialMisconduct.US/CaseStudies/WETvIBM/Story#smokinggun.

So *at that exact point,* any possible misconception was already/totally cleared-up: **the slate had been wiped clean,** and it was obvious Tuvell was not "into" (emotionally invested-in, "entelechy") partisan politics in any way/shape/form. Subsequently, however, some ***other*** **commenters** (*not* Tuvell) on the blog did, crazily, attempt to raise political/partisan issues with Tuvell —— but which he studiously cleanly/clearly/**objectively ⋆provedly⋆ avoided.**

If this is not so, then where, pray tell, did Tuvell engage in Marshall's "precise issue?"

Nowhere (as any casual perusal of Tuvell's 10 posts **objectively ⋆proves⋆**). It doesn't exist. It didn't happen. It's a completely false fabrication. Marshall made it up. He lied. Period. And we've **objectively ⋆proved⋆** it.

The self-same quotation displayed *supra* also **objectively ⋆proves⋆** that Marshall straight-up lied about another intermediate example, his **"sandbagging" defamation** (item †14Ca in Comp/TblDefam AplApx℘13,25): the language **"THAT'S the sort of thing"** *(supra)* couldn't state Tuvell's concern more straightforwardly, *right at the very*

beginning of his interactions on the blog (*after* the initial misconception had been clean-slated). No "sandbagging" involved, in any way/shape/form. Obviously. Factually. Period.[50]

The "Theft Of Professional Services" Defamation

The "Linking" example *supra* was a trivial/easy/baby one; the "Precise Issue" and "Sandbagging" examples *supra* were intermediate ones. At the far end of this spectrum is the most involved/significant/substantial example (of *flatly/objectively provably false fact-based defamation* by Marshall), related now: Marshall's **theft of professional services defamation** (item †14Oj in Comp/TblDefam).

A thorough analysis of this example has been provided at OpAnn16A℘m–r AplApx℘212–217, and this Appellate Panel is hereby encouraged to study it, right now. As **objectively ⋆proved⋆** there, it's a completely false fabrication. Marshall made it up. He lied. Period.

Now, here's the thing to keep in mind as you study this incident: Marshall directly accused (without "opining") Tuvell of attempting to steal professional services from him. **But that was impossible, even on Marshall's own**

50· Plus, that self-same displayed quotation *supra also* provides Tuvell's website URL, where Tuvell's whole story is recorded. So the fact that Marshall didn't even bother looking at it **⋆proves⋆ defamatory reckless negligence** on his part, thereby supplying yet another element of actionable liability to him (℘4γ *supra*).

terms,[51] **because all of the "valuable" services Marshall offers/provides on his blogsite (Ethics Alarms, where all interactions took place) are are not costly/paid —— they are <u>FREE OF CHARGE, TO ALL-COMERS, ALL THE TIME!</u>** Therefore Marshall's bogus charge is either:

- a straight-out factually false (defamatory) lie; or
- it *depends upon* (hence *implies*) some undisclosed false fact (lie).[52]

And keep this in mind, too, as you study this incident:[53] Some audience-members who witnessed this incident *did actually* **believe-as-fact** Marshall's defamatory lies, according to their own report —— as ⋆**proved**⋆ by (e.g., *e pluribus unum*) the comment "Good lord" at OppExhA℘17 AplApx℘94, to which Marshall responds "My thoughts exactly" —— which also ⋆**proves**⋆ his **intent** to induce falsehoods into the minds of his audience, and that inducement

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51· "Marshall's own terms" is here distinguished from (i) Tuvell's denials (and he has certainly always denied it, see OATAnn℘me35(ii′) AplApx℘161); and it is also distinguished from (ii) the built-in *structural reason for impossibility,* namely, Judicial Misconduct Rules disallow ("LITERALLY IMPOSSIBLE") consideration of any third-party-produced materials (Comp℘13¶14·O AplApx℘18, Opp℘17 AplApx℘73, OpAnn℘p AplApx℘215).

52· Defamatory or not —— we just don't know, because it's *undisclosed* (Catch-22). One possible (non-)"fact" Marshall could be hinting at is that Tuvell tried engaging paid professional services via his "regular" (non-blogsite) business (ProEthics), but that never happened.

53· Though, this isn't a required ingredient of the defamation tort in a libel-*per-se* jurisdiction, such as Massachusetts (*Sharratt,* see Opp℘10f15 AplApx℘66).

succeeded just as he intended/anticipated/hoped-for.[54]

VI· Judges Must Not Publish Prejudicial False Statements About Litigants

The Judge, in his Op, portrayed two aspects of the case which were absurdly false (and which he **knew** to be false at the time). The only possible reason he did this was to prejudice readers of the Op (such as the instant Appellate Panel) against Plaintiff, thereby "puffing-up" himself, feigning supercilious omniscience and covering-up his ignorance in not reading Plaintiff's pleadings. This is degrading to the judiciary, erosive of public confidence, and must not be allowed.

These two aspects are:

The Judge Falsely Portrayed Marshall's "Academic" Defamation. In his Op℘14–15 AplApx℘196–197, the Judge falsely writes about the "academic" defamation in Marshall's (as opposed to Tuvell's) so-called "Initial Post," wasting time explaining why that communication was not actionable. That was falsely prejudicial against Plaintiff, because Plaintiff **has never claimed the "academic" defamation to be actionable.** Indeed, Plaintiff explicitly so stated, in Opp℘13ƒ18 AplApx℘69 (see also OATAnn℘lAnn33–34 AplApx℘160), so the Judge was fully

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54· And, this exchange between Marshall and audience also ⋆**proves**⋆ the "arguable reasonableness" of the "close call" mentioned in ƒ27 *supra.* And it also ⋆**proves**⋆ the "did actually" observation of ƒ26 *supra.*

aware of his own falsity.

The Judge Falsely Portrayed Marshall's "Insults." In his insipid Op℘16ƒ9 AplApx℘198 (with a surfeit of inane citations), the Judge falsely writes about the "insults" Marshall hurled at Tuvell, wasting time explaining why such communications are not actionable. That was falsely prejudicial against Plaintiff, because Plaintiff **has never claimed any "insult," however defamatory, to be actionable.**[55] Indeed, Plaintiff explicitly so stated, in both Opp℘13ƒ18 AplApx℘69, and at oral argument OATAnn℘21ℓ16–20,℘22ℓ5,℘28ℓ18,℘30ℓ2,℘k,℘sAnn59,℘ahAnn147 AplApx℘132,133,139,141,159,167,182 (so the Judge was more-than-fully aware of his own falsity). For more information about this point (though what "more" could possibly be needed?), see OpAnn℘u–vAnn16E AplApx℘220–221.

55· All that has been claimed is that such insults **assume/refer-to/imply** other defamations, and *that's* what makes them defamatory themselves (and *not* their merely-insulting-without-more nature).

SUMMARY & CONCLUSIONS; CONJECTURES; *FINIS*

[SUMMARY OF CONCLUSIONS] The Judge made these errors, conclusively, and arrived at the wrong decision:

[IV: "Opinion" vs. "Material Falsity"] He misanalyzed the case (wrong standard of review), by focusing/fixating/obsessing/harping on old-style rote shallow/narrow out-of-context **opinion.** The "opinion privilege" he applied simply doesn't even exist any more (if it ever did), thanks to *Milkovich* and progeny.[56] He should have conducted a new-style thoughtful deep/wide contextual/implicatory analysis of **Material Falsity** instead, via the ***Milkovich* Test**. Doing so would've given him a better chance of arriving at the right decision.

[III: Biased View of "Opinion"] Alternatively, e*ven if* the Judge wanted to lazily limit himself to only the (obsolete) old-style "opinion"-based analysis, he still could've gotten it right, but he got it wrong, twice: (i) Marshall's fig-leaf disclaimer was too remote/tenuous (recall the *Milkovich* example in ƒ25 *supra*); (ii) Mar-

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56· In particular, for those courts formerly holding (unjustifiably) that "determinations of fact vs. opinion is one of law for the court" —— well, that's now null and void, because *Milkovich*'s relevant inquiry is whether the statements are "*sufficiently* factual to be susceptible of being proved true or false," which is a threshold question and not an ultimate legal determination. If some reasonable juror "could conclude that" a statement is factual, then the jury should/must decide the issue, not the judge.

shall's opinions were all based on **undisclosed and/or false defamatory fact-statements (lies)** (else, **where *exactly*, pray tell, are the disclosed/true facts** underlying the linking and theft defamations, ℘32,36 *supra,* and indeed each/every all the others in TblDefam⁇ —— **THEY DO NOT EXIST!!**). And conversely: *even if* the Judge had been "right" about his opinion-interpreted decision (which he wasn't), it would still conflict with the *Milkovich*/Material-interpreted decision (preceding paragraph I *supra*), so he would still be wrong.[57]

[I, II: Biased View of the Facts] The judge misapplied the law by failing to "liberally credit nonmovant's asservations and inferences therefrom," as he should have done, at Motion-to-Dismiss time. Namely, he didn't read (and take seriously) Plaintiff's ~57 claims (otherwise he'd have gotten ensnared in item [III](ii) just *supra*). Instead he just "tuned out" (globally whitewashed), skipping all those messy details because he'd **already made up his mind** about the "opinion" thing.[58]

57· Because, the Supreme Court says what (i.e., interprets) the "supreme law of the land" is, which no one can deny/flout, including/especially not state-based actors (such as judges). *Cooper v. Aaron* (the only Supreme Court decision ever authored/signed by all nine Justices). (At least, this is so for cases not involving Constitutional issues, such as First Amendment Freedom of the Press, where states *can* enact enhanced protections; but the case-at-bar is not such a case, and Marshall is assuredly not "the legitimate Press.")

58· See ƒ59 *infra.* Note, also, that **Marshall himself admitted to committing at least three lies** (OATAnn℘7ℓ8 AplApx℘118) (itself a gross lie, since the actual count ⁑℘42

[V: Conclusoriness] The Judge tried to "get away with it" (avoid his faulty analysis being caught, items I–IV just *supra*) via high-level/broad-brush vague white-wash/handwaving, refusing to explain low-level/nitty-gritty detailed reasoning. If he'd done the latter, he'd have gotten ensnared in item [III](ii) just *supra.*

[VI: Prejudicial Portrayal] The Judge painted a falsely prejudicial (defamatory!) portrayal of Plaintiff. That's childish and stupid, and obstructive of justice. It demeans/degrades the legal/judicial professions.

[CONJECTURES] The preceding conclusions (all of them accompanied, herein and in AplApx, by plentiful persuasive argument/evidence) only address the "what" (the substance/merits) of this Appeal. They don't address "why" Marshall and the Judge below acted improperly, the way they did. It may not be within-scope for this Appeals Panel to divine their motivations, but we can/do make our best-effort guesses here:

[Marshall Conjecture] Our best inference about Marshall's hateful behavior derives from his knee-jerk animus against the "American Left," which for him appears to encompass anyone he perceives (however wrongly/stupidly, e.g. "being academic," OppExhA℘1–2 AplApx℘78–79) with the slightest hint/tint of liberal/Democratic views. Having

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↕℘41 is ~29, see TblDefam), but the Judge just swept that inconvenient fact under the rug.

dumbly/wrongly pigeon-holed Tuvell into that bucket, he couldn't "let it go" (even after being straightened out, OppExhA℘6–7 AplApx℘83–84), and "couldn't help himself" from descending into his unjustifiable chaotic rage, resulting in Tuvell's banishment (OppExhA℘15–16 AplApx℘92–93). **That was HATE(FUL) SPEECH, pure and simple —— NOT the kind of legitimate "opinion" ("marketplace of ideas") that First-Amendment-like FREE SPEECH laws/inclinations are intended/designed to protect.**

[Judge Conjecture] Our best inference about the lower Judge's ignoble bias[59] against the instant Plaintiff has nothing to do with the case now before this Appeals Panel, nor *ad hominem* against Tuvell. Instead, it has to do with the Plaintiff's other case, *Tuvell v. IBM* (and his Judicial Misconduct charge against the judge in that case), and particularly his website, http://JudicialMisconduct.US. Namely, we believe the Judge was acting upon a misguided/wrongful desire to "protect the *faux* sanctimoniousness of the robe" (such as his own), by pretending the whole concept of Judicial Misconduct/crime

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59· Combined with cowardly delay. The Judge falsely promised *twice* at oral argument (OATAnn℘34,36 AplApx℘145, 147, indicating/signaling that he'd **already made up his mind** about how he would rule) that he'd render his decision/judgment within 1–2 weeks, no doubt knowing/planning he'd drag it out for ten weeks (Jun 7 → Aug 21, a "mis-estimate" of ~500–1000%, which cannot conscionably be called innocent/competent/good-faith) —— thumbing his nose at the "justice delayed is justice denied" maxim.

"doesn't exist." It does exist.[60] **That was <u>COVER-UP</u>.**

[FINIS] It is now up to this Appeals Court to correct these errors/faults, and arrive at a responsible, justifiable/justified (non-conclusory!), decision. **Namely: rejection/reversal of the lower Judge's Order of Dismissal, and reinstatement of this case.**

Marshall's pretension to opinionation is pure mendacity. The Judge's swallowing it is pure disingenuity.

The Internet is not a *carte blanche* Get-Out-Of-Jail-Free card for defamation. Observable/objective reality is what rules. And in this case, **observable/objective reality resides visibly in Tuvell's 10 blog posts**[61] (in OppExhA), not in Marshall's *ex post facto* cynical gaslighting.[62]

60· And unless it's cleaned up, it even has the potential to seriously rip apart the fabric of America. *Cf.* the recent Brett Kavanaugh confirmation "shitshow" —— in the wake of which multiple credible (sexually-related and other) Judicial Misconduct Complaints were officially filed against that judge, and the ensuing FBI/judiciary investigations were called "jokes"/cover-ups/etc. (all of which we mention here only for their judicially corrosive effects/potential, not that we take any partisan position whatever).

61· Each/every one, which very effectively demolish all of Marshall's ~57 incidents of defamation —— **each/every one, individually,** <u>*as the law unequivocally requires/demands*</u>. ƒ12,39,42,43 *supra.* Those 10 posts tell the story clearly/plainly, in **"black-and-white" *(literally):*** no leeway for "judicial interpretation" is required/warranted/permitted —— **interpretation is reserved for the jury,** <u>*as the law unequivocally requires/demands*</u>. ƒ27(ii) *supra.*

62· Recalling that the real reasons for Marshall's lies (as opposed to his *ex post facto* pretended "opinionation") are most likely the scenarios listed at ℘30 *supra.*

And we certainly don't need/want any judges **cover-ing-up** for bad judges. Judges must be good/honest in the first place, *ab ovo.* *Any* (even a single one) bogus/unper-suasive/false "judicial opinion," no matter how infini-tesimal, represents a clear-and-present threat/danger to the legitimacy of the *whole* judicial system.

You —— this very Appeals panel, a new/independent set of judges with *de novo* review powers —— have *always* **known** this. *Now,* you have a professional/moral/solemn/sa-cred/sworn **duty** to ⋆**prove**⋆ it.

SIGNATURE; VERIFICATION

Respectfully submitted, and hereby signed, under the pains and penalties of perjury. (This signature/verification and date also apply to the CERTIFICATES OF COMPLIANCE AND SERVICE, ℘50 *infra.*)

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Dec 12 2018

EXHIBIT A (*MARCOTTE* ARTICLE)

A White House aide takes the microphone from CNN's Jim Acosta, during a news conference in the East Room of the White House, Wednesday, Nov. 7, 2018. A doctored video of this incident has gone around. (AP/Evan Vucci)

Conservatives have gone fully fact-free: So how the heck do we even talk to them?

The "debate" over the Jim Acosta video shows the right has no use for facts. Is there any way to talk to them?

AMANDA MARCOTTE

NOVEMBER 12, 2018 8:35PM (UTC)

Last week, Donald Trump's administration pulled off another of the routine stunts it uses to hijack the media narrative, whip up the right-wing base, and distract both journalists and pundits from more important news stories. On Wednesday, Trump used a press conference to create a reality TV-style beef with CNN reporter Jim Acosta. First he got testy with Acosta for asking pointed questions, and then he directed a White House intern to try to confiscate Acosta's microphone. Acosta's efforts to hold onto the microphone resulted in incidentally touching the female intern's arm.

White House press secretary Sarah Huckabee Sanders immediately pretended to believe that a brief brush-off was the equivalent of deliberate gendered violence, using a doctored video created by a conspiracy theory website to back up her obvious bad-faith claims. This lie became the pretense for booting Acosta from the White House press pool.

Whether the stunt was planned in advance or not, it worked out beautifully for the White House, which saw hefty amounts of internet and cable news coverage turned over to a pointless debate between people faking umbrage over this brief touch and people pointing out what was obviously true, which was that Acosta didn't do anything wrong. The video, both in its real and doctored form, was endlessly analyzed. Perhaps most important, media attention was diverted from last week's real stories: The Democratic wins in Tuesday's midterm elections and Trump replacement of Attorney General Jeff Sessions with Matt Whitaker, an unqualified lackey whose only job duty appears to be obstructing legal inquiries into Trump's possible crimes.

Watching smart people fruitlessly insist on arguing evidence and facts with conservatives who clearly have no respect for either got under my skin. I took to Twitter to point out that no one actually *believes* Acosta did something wrong, but that many Trump-supporting conservatives are simply faking that belief in order to troll the left and distract the media. I wrote a whole book, "Troll Nation," about the way that "triggering the libs" has become the single most important goal of the modern American right. And how better to do this than to pretend to believe something obviously false, and then laugh at liberals as they drive themselves nuts desperately trying to get conservatives to see reason?

These tweets went viral, which I suppose shows that many on the left have finally decided that it's time to accept that your average conservative fancies himself to be Hannibal Lecter masterfully trolling Clarice Starling. (Buy my book!) In truth, it doesn't actually require much in the way of grace or wits to gaslight liberals. All it requires is a shameless willingness to say obviously false things, and then watch your opponents -- still romantically attached to the idea of reasoned debate -- grow increasingly desperate in insisting that objective reality should inform one's opinions.

But while many people liked my tweets, others on the left responded with frustration, asking how, exactly, we're supposed to deal with right-wingers if they flat out reject the idea that truth has any value in political discourse.

I find this question frustrating, mainly because it assumes that for every problem, there must be a solution — an assumption that the evidence simply doesn't support. How do you persuade people to listen to reason or acknowledge the facts, when they have openly declared that they don't care about reason or facts?

The answer is simple: You can't. These are autonomous adults who have decided that loyalty to Trump and hatred of liberals matters more than the truth. There are no cool psychological tricks one can use that are likely to convince them to readjust their values system.

That answer, of course, is unsatisfying, because it's not like liberals can simply drop all engagement and discourse with conservatives. Doing that would be tantamount to giving up on this country and letting the liars drag us directly down the path to authoritarianism, and quite possibly outright fascism. So what do we do, rhetorically speaking, to fight back?

The first thing liberals and journalists should do is find ways to speak the truth without inviting conservatives to troll them with "debate" about it — debate that will inevitably just be the pitting of lies against truths, leaving those who still believe in reason frustrated and giving conservatives endless opportunities to gloat about their triggering talents.

There are a variety of tools that accomplish this, but the primary one is to avoid speaking *to* liars and instead speak *about* them. For instance, cable news would do well to stop inviting Kellyanne Conway or other administration liars to appear on camera and tell more lies. That time would be better used straightforwardly debunking their numerous falsehoods and deliberate misstatements.

Brevity is key here. Whenever you're explaining, you're losing. For instance, it was a waste of time going frame by frame through that Jim Acosta video to prove he did nothing wrong, since everyone who claimed to believe he had done something terrible was lying in order to troll the left. Journalists would have done better to present the fact that Acosta did nothing wrong as self-evident truth, which it was, and move on to addressing the real story, which is how Trump uses lies to advance his agenda.

When it comes to more direct encounters with trolling right-wingers — on social media or, say, at the Thanksgiving dinner table — the maxim to live by is that you can't reason someone out of a belief they didn't reason themselves into. Evidence, facts and rational argument are all pretty useless when you're dealing with a person who rejects the value of all those things.

It's a good idea to remember what the troll is trying to get out of this situation. For most conservatives who play this game, they "win" either by baiting a liberal into a pointless and unwinnable debate or by making the liberal flustered and angry. So don't reward them by giving them either.

Instead, try to raise the social costs of lying for the purpose of trolling -- as high as possible. For randos on social media, shame is admittedly unlikely. Blocking them and depriving them of the interaction they crave is the only real method. But on those occasions when you're engaged with a coworker, friend or family member, that's a time that social shaming — which liberals are often reluctant to use, but which can be really effective — is helpful.

Don't debate facts. Focus instead on impacts. Instead of getting into an argument about whether climate change is real, point out that lying in order to leave the world a worse place for one's children is gross behavior. Don't debate whether #MeToo has gone "too far" or whether Christine Blasey Ford is lying. Instead, shame the person saying these things by bluntly stating your support for victims and opposition to sexual abuse. I find that making it personal can often be really helpful. If a conservative in my life praises Trump for trolling the press with his "enemy of the people" language, I might ask that person if they really think that I am a force for evil and that I should be censored, or perhaps imprisoned.

Be calm and dispassionate, however, and state things matter-of-factly. Any sign of emotion will be taken as evidence of "triggering" and is likely encourage to encourage still more trolling behavior. But I've personally had a lot of luck with calm but adamant shaming, perhaps because it makes *behavior* the focal point, rather than some pointless debate over what the facts are.

None of this really changes anybody's mind, I'm sure, and the conservatives in your life will no doubt grumble about how you're "politically correct" as soon as you leave the room. That's too bad, but it's really out of your control. What liberals can do is try to minimize the amount of lying and trolling by raising the costs of doing those things, and reducing the rewards. If it makes you feel bad to shame someone, that's understandable. Remember that they are trying to make you feel bad by telling deliberate lies and baiting you with trolly arguments.

Things are going to get a lot worse on this front, I'm afraid, before they get better. Trump and outlets like Fox News are escalating the lies and trolling stunts, and the conservatives who follow them are marching right in line. Trying to win arguments against those forces with facts and reason has failed time and again. It's time for new strategies, instead of irrationally hoping that someday truth will come shining through and carry the day.

AMANDA MARCOTTE

Amanda Marcotte is a politics writer for Salon. Her new book, "Troll Nation: How The Right Became Trump-Worshipping Monsters Set On Rat-F*cking Liberals, America, and Truth Itself," is out now. She's on Twitter @AmandaMarcotte

CERTIFICATES OF COMPLIANCE AND SERVICE

CERTIFICATE OF COMPLIANCE

Pursuant to MRAP 16(k), I hereby certify that this brief complies in all material aspects with the pertinent Rules of Court. (See ℘46 *supra.*)

This very page illustrates compliance with the salient type-density requirements of MRAP 20(a)(1–3). See the bottom of this page for a maximum-length line of 57 characters (noting that 5½ inches/line × 10½ chars/inch = 57¾ chars/line).

CERTIFICATE OF SERVICE

Pursuant to MRAP 13(d), I hereby certify that I have served notification of and access to this document upon Defendant, via email and first-class U.S. Mail. (See ℘46 *supra.*)

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