NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1605

WALTER TUVELL

vs.

JACK MARSHALL.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This case, which arises out of a series of communications between the parties on and around the defendant Jack Marshall's Internet blog,[1] "Ethics Alarms," requires us to review the dismissal of the plaintiff Walter Tuvell's defamation claims against Marshall. To the extent that we can parse them from his briefing,[2] Tuvell's legal arguments are that (1) the motion judge applied an incorrect standard, and (2) the judge incorrectly

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[1] A "blog" is defined as "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer." Merriam-Webster's Collegiate Dictionary 133 (11th ed. 2005).

[2] Tuvell's arguments on appeal are difficult to understand and do not satisfy the requirements of Mass. R. A. P. 16, as appearing in 481 Mass. 1628 (2019). Nonetheless, we have carefully reviewed his submissions and address those arguments that we can discern.

A I have no idea what “difficult understand” means. I also have no idea what “doesn’t satisfy the requirements of MRAP §16 means, because the Clerk’s office routinely checks that all filings properly satisfy all requirements, and they verified mine were OK (after making me move an image from one place to another). MRAP §16 is long and complicated, so without further explanation nobody can know what it’s supposed to mean. Finally, 482 Mass. 1628 (2019) is not available online as of this writing, so I don’t know what that means either.

B All my “arguments,” in ApltBrief (somewhat elaborated upon in ApltRply), are itemized I–VI. All of them, except for Argument VI (which is valid, but can be ignored here), are “legal arguments,” in the sense that they are instrumental in how judges must adjudicate Summary Judgment in this case. And, most of them can indeed be boiled down into the two buckets listed in this **AplOp.** But doing so loses precision/clarity, so it’s unclear why AplOp feels a need to do that.

applied the law to the allegations in Tuvell's complaint.[3] For the reasons discussed, we affirm.

We review de novo the allowance of Marshall's motion to dismiss Tuvell's complaint, see Santos v. U.S. Bank Nat'l Ass'n, 89 Mass. App. Ct. 687, 691-692 (2016), in order to determine whether Tuvell's complaint stated "factual 'allegations plausibly suggesting . . .' an entitle[ment] to relief." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007). Like the motion judge, in conducting our review, we consider not only Tuvell's complaint, but the uncontested copy of the communications and blog postings on which the complaint is based, and on which we conclude Tuvell relied in drafting that pleading. See Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 224 (2011) (in framing complaint plaintiff relied on extrinsic documents not excluded by motion judge). We take as true the well-pleaded factual allegations of the complaint, and any favorable inferences that may be drawn from them, see id. at 223, "[h]owever, we do not accept legal conclusions cast in the

[3] Tuvell's remaining contentions do not rise to the level of appellate argument, and we do not address them. See Zora v. State Ethics Comm'n, 415 Mass. 640, 642 n.3 (1993). In any event, "our review of the record shows that none of them has merit." Id.

A As explained in item 1B, it’s unclear what this “remaining contentions” (other than Argument VI) is supposed to mean.

B This is the blog entry in question. It was submitted to the Superior Court as **OppExhA;** and to the Appeals Court at **AplApx**℘**77–111,** and also (in cleaner formatting) as the appendix to **ApltRply** (where it’s referred to as **AplApx Bis**), though that cleaner copy was rejected by the Court, for unknown/arbitrary/whimsical reasons.

form of factual allegations." Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000).

Background. We summarize Tuvell's allegations with these parameters in mind. In August 2017, Tuvell contacted Marshall via electronic mail message (e-mail) critiquing Marshall's blog. Marshall posted a portion of Tuvell's e-mail on his blog; the posting did not identify Tuvell by name. Tuvell publicly responded to Marshall's post, identifying himself as the author of the e-mail. Tuvell exchanged public posts with other readers on Marshall's blog, many of which concerned whether and how the readers, including Tuvell, viewed the political or "partisan" tenor of the blog. Marshall engaged with Tuvell on the blog, suggesting that Tuvell was the instigator of any partisanship on the blog; ultimately, on the day after Marshall posted the original e-mail from Tuvell, Marshall "banned" Tuvell from further posts. In the course of these communications with and about Tuvell, Marshall made various observations about Tuvell's being "special," a "jerk," "a few cherries short of a sundae," and "an asshole," and describing his posts as "whiny" and "bitching." Marshall wrote that Tuvell was "not honest," because Tuvell had "sandbagged" him by pretending interest in the subject matter of Marshall's blog while intending to draw attention to Tuvell's own interests and obtain free legal advice. He published a link to Tuvell's website, and, drawing

A The email is at AplApx℘222–224. It was a *private* email, never intended to become *public.* And it was polite (as Marshall himself stated), and only mildly “critical:” it only observed/noted (obviously correctly) that during a few weeks’ observation the types of discussion posted on EthicsAlarms didn’t seem to live up to its About page, and it asked: “Is that [right-leaning political/partisan] the way you really see things? Or am I missing something?”

B This isn’t so. Others tried pushing me to speak in nonsensical political/partisan ways, but I refused to be dragged down into that mud.

C Yes, Marshall “suggested” that, but it was false, as I responded to him.

D The banning was primarily motivated by Marshall’s so-called “linking defamation” falsely claiming it “sandbagged” (see item 3F *infra*), but I didn’t complain about the banning *per se* (“without more”), I only complained about the “with more” *implied* by the defamation/banning, i.e., the linking/sandbagging defamation itself. (This is standard stuff in the law of defamation.)

E I never complained about any of these epithets *per se* (“without more”), they’re trivial and non-actionable, except insofar as their “with more” *imply* other defamations (similar to item 3D *supra*).

F Yes, this is what Marshall maintained (his “linking defamation,” so-called at ApltBrief℘33, where he wrote “initially with a link in a comment to another commenter,” the operative word being *initially*), but it’s **provably objectively literally non-factually false** (that is, ***not*** **“non-actionable opinion”** the sense of defamation law).

The Merriam-Webster definition (Merriam-Webster is acceptable to the Court, see AplOp footnote #1 *supra*) of “sandbagging” is “to conceal or misrepresent one’s true position, potential, or intent especially in order to gain an advantage over.”

But that **didn’t (couldn’t possibly) happen,** because I was upfront from the **very initial beginning** (never “concealing or misrepresenting”) precisely about my “true position … intent” — namely I stated my position/intentions in my **very first** post to Marshall’s blog, and as Marshall then explicitly **acknowledged** (*before* doing his “banning”). This is explicated at ApltBrief℘33–34, ApltBrief℘9–10.

G No, Marshall didn’t “publish a link” to my website. (Only I did that.) But even if he had, that still wouldn’t ameliorate the defamations he made, because there exists no such thing as a “Forum Duty to Investigate” (see ApltRply℘18–25).

Example: The basic facts of the Sandy Hook massacre are widely available (via both traditional media and the Internet), but that hasn’t prevented the defamation lawsuit(s) against Alex Jones, who publishes false conspiracy theories about Sandy Hook, including that it didn’t happen (i.e., no “Forum Duty to Investigate” makes Jones’ defamations non-actionable). https://www.huffpost.com/entry/sandy-hook-parents-hit-alex-jones-with-defamation-lawsuits_n_5acf6a6de4b0ac383d74bfe1.

on the material posted there, wrote that the judge in a case brought by Tuvell "decided that [Tuvell's] case was lousy, and dismissed it," and commented on Tuvell's account of his own "PTSD."

Tuvell filed suit for defamation; Marshall responded with a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), which Tuvell opposed. After a hearing, and in a thoughtful memorandum, the judge allowed the motion. Tuvell filed a timely appeal.

Discussion. To establish a claim for defamation, a plaintiff must prove four elements: (1) the defendant made a false statement to a third party, (2) of or concerning the plaintiff, (3) that was capable of damaging the plaintiff's reputation in the community and caused the plaintiff economic loss or is actionable without proof of economic loss, and (4) that the defendant was at fault. See Ravnikar v. Bogojavlensky, 438 Mass. 627, 629-630 (2003).[4] An allegedly defamatory statement must be assessed in context, and not as isolated words

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[4] Despite Tuvell's having injected himself into the public blog forum, we assume without deciding that Tuvell is a private figure, and that any "fault" is assessed using a negligence standard. See Jones v. Taibbi, 400 Mass. 786, 797-799 (1987).

A I certainly don't see anything "thoughtful" about it. ApltBrief, ApltRply.

B For the "hornbook" definition (which is slightly/insignificantly different), see ApltBrief℘4, where it is explained that the "falsity" required really means "material falsity," and that in Massachusetts all *libel* (as opposed to slander) is actionable without proof of economic loss or other "special harm."

C As opposed to "(limited-purpose) public figure," see Opp℘11 ApltBrief℘67.

D As opposed to "actual malice" (though Marshall did indeed act with "actual malice," see ApltBrief℘4ƒ2).

or phrases.[5] See Scholz v. Delp, 473 Mass. 242, 250 (2015). The judge considers factors including "'the specific language used'; 'whether the statement is verifiable'; 'the general context of the statement'; and 'the broader context in which the statement appeared.'" Id., quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 9 (1990). The judge also takes into account "any 'cautionary terms used by the person publishing the statement.'" Scholz, supra at 251, quoting Lyons v. Globe Newspaper Co., 415 Mass. 258, 263 (1993). Ordinarily, neither an expression of opinion nor hyperbolic statements are actionable. See National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 227 (1979), cert. denied, 446 U.S. 935 (1980) ("A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is"). See also Scholz, supra at 249-250; Restatement (Second) of Torts § 566 & comment c (1981).

We begin by observing that the statements at the heart of Tuvell's complaints were made on a blog, see note 1, supra, a forum generally understood to reflect the personal views of the

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[5] A point that Tuvell, whose argument on appeal includes criticism of the motion judge's failure to address individually each of the statements he considers to be defamatory, overlooks.

A This is bullshit: I don't ignore context at all; I properly refer to "context" many dozens times in ApltBrief and ApltRply! The "criticism of the motion judge's failure to address individually" mentioned here refers to ApltBrief℘16ƒ12,41,42 which refers (properly/correctly) to the "~57" (ApltBrief℘7) *instances of Marshall's defamations* — and *not* to "isolated words or phrases" as falsely/crazily claimed here!

B Yes, yes, of course I agree with everything in this paragraph (as I say many times in ApltBrief and ApltRply). But note particularly the language "ordinarily" and "not itself," meaning "without more" (in the standard legal terminology). I.e., they mean "in the absence of the kind of "material falsity" (a.k.a. "with more") envisioned in the definition of actionable defamation. And that's all I ever complain about.

blog's writer, here, Marshall.[6] With some exceptions, which we address below, the majority of the statements cited as defamatory in Tuvell's complaint can only reasonably be understood as expressions of Marshall's opinion which, regardless of their tone, are not actionable. See *Downey* v. *Chutehall Constr. Co., Ltd*., 86 Mass. App. Ct. 660, 663-664 (2014) (determination whether statement is factual assertion or statement of opinion must be decided based on how statement can be reasonably understood). We include in this category Marshall's statements about his determination that Tuvell's conduct warranted his being "banned" from the blog; his communications to Marshall being treated as unwelcome "spam[]"; and his descriptions of Tuvell as "special," a "jerk," and an "asshole" and of his posts as "whiny" and "bitching."[7] There is some overlap in these categories of statements with others, like Marshall's description of Tuvell's post as "teeter[ing] on the edge of madness," that are instances of pure hyperbole, likewise inactionable.

To the extent that Tuvell complains about Marshall's publicizing Tuvell's failed lawsuit and the posttraumatic stress

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[6] The "Comment Policies" Marshall established and posted for his blog give Marshall broad discretion in approving, editing, and "banning" writers and their submissions.

[7] This latter category of terms also qualifies as nondefamatory hyperbole.

A AplApx℘52–55. It’s very vanilla, really not seriously relevant to this case at all.

B This is, of course, the “original sin” (because it contravenes overriding law, namely *Milkovich*), exactly what the Superior Court judge said, and it’s just a **big fat flat lie (especially the “only” part, see item 6C *infra*)!** That’s exactly what I address in ApltBrief℘17–22 Argument III. And the Appellate Judges here are making the same exact “error” (really, lie), of **conclusorily labeling Marshall’s writings as “opinions (based upon true facts)” without actually checking them, each-and-every, one-by-one, to determine whether or not they are actually true (and they’re *not*).** The actual fact is that what Marshall writes is factually objectively literally false (or is materially false, i.e., implies other false facts). This is what needs to checked, each-and-every, one-by-one, for all the ~57 instances of defamation itemized in the Table of Defamations, **TblDefam** AplApx℘24–30. There exists no Royal Road shortcut (ApltRply℘16).

C In citing *Downey v. Chutehall* here, AplOp fails to include the whole relevant quote (emphasis added): *“…* [T]he determination whether a statement is a factual assertion or a statement of pure opinion is a question of fact if the statement reasonably can be understood **both ways.** … [I]f a statement is susceptible of being read by a reasonable person as **either a factual statement or an opinion,** it is for the **jury [not the judge] to determine.**” (I already wrote about this, citing *Scholz v. Delp,* at ApltBrief℘24–25f27)

In the case-at-bar, of the ~57 statements in question, they **are *all* materially false (provably),** hence they **can** all be “reasonably understood” as “fact(-as-opposed-to-opinion)” — and this is where the “only” part of item 6B *supra* is a lie. Hence, *even if* some of the statements can also be “reasonably understood” as “opinion,” they can still also be understood **both ways.** Therefore, summary judgment is not appropriate, per *Downey v. Chutehall.* (Hoist by their own petard.)

D The “category” here appears to be comprised of “isolated (out-of-context) words and phrases,” which I never complain about “without more.” When I do complain about words like these, it’s for their “more” *material falsity* content of *implying* false facts, as I state many times.

disorder that Tuvell attributed to it, Marshall's recitation of those facts only repeated information that Tuvell himself gave publicly to Marshall; Tuvell could hardly complain that the facts were false. See Myers v. Boston Magazine Co., 380 Mass. 336, 339-341 (1980).

The closest question is the status of Marshall's statements that Tuvell misrepresented to him the true reason for his interest in Marshall and his blog, and his statement that Tuvell's contact was a means of seeking free legal advice about his failed lawsuit. Ultimately, we conclude that such a statement, even if false, would not be actionably defamatory because in context, it was not likely to "discredit[] the plaintiff in the minds of any considerable and respectable class of the community." Brauer v. Globe Newspaper Co., 351 Mass. 53, 55 (1966). We place particular emphasis on the fact that the statements here were made in a blog, the format and substance of which "implied commentary rather than the statement of objective facts."[8] Disend v. Meadowbrook Sch., 33 Mass. App. Ct. 674, 676-

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[8] Marshall's blog provided the content and opinion that Marshall chose to include there, and while Marshall disclaimed any political partisanship, the blog could not reasonably be read as anything but Marshall's own viewpoint on his subject matter. Additionally, with respect to his comment about Tuvell's website and motivation, Marshall provided the link Tuvell had provided to him to allow the blog's readers to see Tuvell's blog for themselves, allowing them to make their own assessment of Tuvell's likely motives.

A But of course, I *don't* complaint anywhere about Marshall's "publicizing" that! Where the hell did they ever get that idea that I do??

B This refers to Marshall's "linking," "sandbagging," and "free expert opinion" defamations (TblDefam †14Ca,d,Oj–l and several closely related items).

C But that's false, because it **did in fact "discredit"** me, as proven by the fact that several commenters to the blog said so in various ways!

D This "emphasis" is remarkable — because it's just flat **wrong (invalid, not-good-law)!** Namely, it goes against exactly what *Milkovich* says. Namely, it was precisely this kind of **"sacrosanct prior immunity"** (ApltRply$_{\wp}$26) argument that the *Milkovich* (losing) *defense* tried to argue, but that failed because it was was rejected by the *Milkovich* majority. This is explained at ApltRply$_{\wp}$12–17: "Context Matters — But Not That Much."

And, looking at the various citations provided here (*Disend,* etc.), we see that while they support what the Panel claims they do — namely, "*a priori* categorical exemption of 'implied commentary rather than the statement of objective facts'" — **that's just plain invalid law, because it contravenes *Milkovich.*** Yes, I agree, that some types of publications (such as EthicsAlarms) do *generally* support "opinion vs. facts." But that does not negate the fact that *sometimes* factual statements still can/do penetrate into even the most opinionated publications. And in fact, that's precisely what happened in *Milkovich* (and I discuss exactly that at ApltBrief$_{\wp}$29f35).

To quote *Milkovich:* "Simply couching a statement — 'Jones is a liar' — in terms of opinion — 'In my opinion, Jones is a liar' — **does not dispel the factual implications contained in the statement.**" In place of "couching," **the same thing can be said about "statements appearing on an ostensibly 'opinion'-oriented publication/website"** — it does not dispel the factual implications contained in the statement.

In fact, *Milkovich* explicitly addresses this, because it **explicitly rejected** its inferior court's statement that: "On balance … a reader would not expect a sports writer on the sports page to be particularly knowledgeable about procedural due process and perjury. It is our belief that 'legal conclusions' in such a context would probably be construed as the writer's opinion."

So sayeth *Milkovich.* ***Milkovich* explicitly rejects the reasoning of the Superior Court and the Appellate Panel in this case, *Tuvell v. Marshall.***

E False, because this relies on the false "sacrosanct 'opinion privileged' webblog" determination.

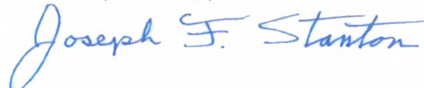
F That's nonsense, because it relies on the non-existent "Myth of Forum Duty to Investigate" that I address in ApltRply.

677 (1992). See, e.g., Aldoupolis v. Globe Newspaper Co., 398 Mass. 731, 733-735 (1986); Pritsker v. Brudnoy, 389 Mass. 776, 778-783 (1983); Myers, 380 Mass. at 338-342. We do not see that Marshall's speculation about Tuvell's motives would "tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community." Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 853 (1975).

To the extent that we have not specifically addressed subsidiary arguments in Tuvell's brief, they have not been overlooked. "We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954). There was no error in the dismissal of Tuvell's complaint.

Judgment affirmed.

By the Court (Blake, Lemire & Hand, JJ.[9]),



Clerk

Entered: October 31, 2019.

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[9] The panelists are listed in order of seniority.

A But we’re not talking about “speculation about Tuvell’s motives” at all. Remember, I was upfront about my motives of seeking his legal/ethics opinion (in my first post to the blog), and that was never questioned. Instead, Marshall lied about the “linking/sandbagging” stuff — that’s where the real defamation happened (and also, secondarily, about the “paid vs. free” legal/expert advice — there was never any hint of that, because everything Marshall said on EthicsAlarms was free to all-comers all-the-time anyway, and at the stage the case *Tuvell v. IBM* was at, no “expert opinion” could be injected into it in any manner).

B Right, it was *other* things that did this, see item 7C *supra.*

C Actually, the above annotations show there was quite a lot the Panel “overlooked,” and in particular “misunderstood.”