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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

A

SUPERIOR COURT
CIVIL ACTION
No. 1781CV02701



WALTER TUVELL

vs.

JACK MARSHALL

DECISION AND ORDER ON DEFENDANT’S MOTION TO DISMISS

This plaintiff, Walter Tuvell (“Tuvell”), is a Massachusetts resident. Among other things, Tuvell maintains a website, titled “Judicial Misconduct USA,” a topic in which Plaintiff is deeply interested. The defendant, Jack Marshall (“Marshall”), is a Virginia resident. Among other things, Marshall maintains a website, titled “Ethics Alarms.” On that website, Marshall holds himself out as an ethics expert and offers commentary, in the form of blog postings, on a variety of issues from his perspective as an ethicist. On August 26, 2017, Tuvell sent an email to Marshall. On August 27 and August 28, Marshall published on his website a handful of postings that concerned Tuvell and the email Tuvell had directed to Marshall. Marshall also “banned” Tuvell from the Ethics Alarms website, and explained his reasons in one of his postings on August 28. A few weeks later, Tuvell filed this civil action for defamation, arising out of Marshall’s posts to his Ethics Alarms website and his banning of Tuvell from that site. Before the court is Marshall’s motion to dismiss Tuvell’s complaint for failure to state a claim. For the reasons set forth below, Marshall’s motion to dismiss the complaint is allowed.

B



C



I. Standard

A motion to dismiss may be granted where a party fails to state a claim on which relief can be granted. Mass R. Civ. P. 12(b)(6). “For purposes of deciding a motion to dismiss, [the court] accept[s] as true the allegations in the complaint, and draw[s] all reasonable inferences in favor of the party whose claims are the subject of the motion.” *Fairney v. Savogran Co.*, 422 Mass. 469, 470 (1996). The court, however, “do[es] not accept legal conclusions cast in the form of factual allegations.” *Schaer*, 432 Mass. at 477. In order to survive a motion to dismiss, a complaint must contain factual allegations “plausibly suggesting” that the pleader is entitled to relief. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007). When evaluating a Rule 12(b)(6) motion, the court may take into consideration not only the allegations in the complaint but also matters of public record, items appearing in the record of the case, exhibits attached to the complaint as well as documents relied upon in framing the complaint. See *Schaer*, 432 Mass. at 477; *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 224 (2011). See also *Watterson v. Page*, 987 F.2d 1, 3-4 (1993) (observing that “documents the authenticity of which are not disputed by the parties” may be considered on a motion to dismiss).

II. Facts¹

On August 26, 2017, Tuvell, who recently started visiting a website entitled “Ethics Alarms” (ethicsalarms.com), sent an email to Marshall, the website’s operator. On the website, Marshall holds himself out as an ethics expert and offers commentary, in the form of blog

¹ Attached to Tuvell’s opposition brief is a printout of the webpage from the Ethics Alarm website which contains the statements alleged to be defamatory. The webpage was heavily relied upon and quoted by the plaintiff in drafting the complaint, and Marshall does not appear to contest that the attached printout is an accurate representation of the webpage. Thus, the Court may rely on this printout without converting the motion to one for summary judgment. See *Golchin*, 460 Mass. at 224; *Watterson*, 987 F.2d at 3-4.

postings, on a variety of issues from his perspective as an ethicist. Tuvell sent the email to the address listed on the website's "About" section.

Marshall did not reply directly to Tuvell's email. Instead, he addressed the email in the first part of a long post titled "Morning Ethics Warm-Up: 8/27/17." The relevant portion of Marshall's post, which did not refer to Tuvell by name, stated:

A → 1. I received a nice, polite e-mail from a new reader here who accused me of engaging exclusively in "partisan/political rants." "Further," he wrote, "everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal/democrat is bad)."

The man is an academic, so one might expect a little fairness and circumspection, but then, the man is an academic. His description is in factual opposition to the contents of the blog (I'm trying to think of the last Republican leader, conservative or otherwise, I designated as "good"), but I know from whence the impression arises: the fact that the entire American Left, along with its sycophants and familiars, the universities, show business and the news media, have gone completely off the ethics rails since November 8, 2016. I don't know how else I am supposed to address that. It would have been nice, for balance's sake, if a conservative cast of white actors in, say, a hit musical called "The Ray Coniff Story" had stepped out of character and harassed, say, Chuck Shumer, but this didn't happen. If it had, I would have treated that breach of theater ethics exactly as I did the cast of Hamilton's harassment of Mike Pence. (I would not, however, have been attacked for doing so by my theater colleagues, and no, I haven't forgotten, and I'm not forgiving.)

If a GOP figure working for CNN as an analyst, say, Jeffrey Lord, had used his connections at the network to forward debate questions to Donald Trump and then lied about it when he was caught red-handed, I would have eagerly written about it in highly critical terms—but the Republicans didn't cheat. Donna Brazile and the Democrats did.

If Hillary Clinton had been elected President and Donald Trump and the Republicans formed an anti-democratic movement called "the resistance," tried to use a single Federalist paper as a rationalization to change the rules of the election and then pressured performers not to allow the new President the privilege of a star-studded, up-beat inauguration to unify the nation, and if a large contingent of Republican Congressmen had boycotted the ceremony, saying that they did not consider Hillary as "legitimate President," Ethics Alarms would have been unmatched in expressing its contempt and condemnation. If

conservatives were trying to limit free speech according to what they considered “hateful,” a step toward dictatorship if there ever was one, I would be among the first to declare them a menace to society. They haven’t advocated such restrictions, however. Progressives have. The Mayor of Portland has called for a “hate speech’ ban. What party is he from? Howard Dean said that “hate speech” wasn’t protected. What party was he the Chair of? I forget. What was the party—there was just one— of the mayors who announced that citizens holding certain views should get out of town?

“Need I go on? I could, *because the uniquely un-American, unfair and destructive conduct from Democrats, progressives and the anti-Trump deranged has continued unabated and without shame for 10 months now.* That’s not my fault, and I don’t take kindly to being criticized for doing my job in response to it. I have chronicled this as unethical, because it is **spectacularly** unethical, and remains the most significant ethics story of the past ten years, if not the 21st Century to date.

And the reluctance and refusal of educated and usually responsible liberals and Democrats to exhibit some courage and integrity and vigorously oppose this conduct as they should and have a duty as Americans to do—no, I am **not** impressed with the commenters here who protest, “Hey, I don’t approve of all of this! Don’t blame me!” as if they bear no responsibility—is the reason this execrable conduct continues. It is also why I have to keep writing about it.

(bold and italics in original). The post then went on to discuss other topics at some length in

a similar fashion. Tuvell responded in the comment section of “Morning Ethics Warm-Up:

8/27/17” a few hours later, writing:

A  **Walter E. Tuvell**

I am the author of “Item #1” in Jack’s Morning Ethics Warm-Up for Aug 27 2017. For the record, here is the content of the email I sent him, which instigated Jack’s response:

Jack – I’ve been following your website (<https://ethicsalarms.com>) since I “discovered” it a couple of months ago. Its About page is especially lucid and luring.

The problem is, your posts don’t live up to the About advertisement. Specifically, the About page speaks only about whole-life ethics (a very laudable goal, what I was looking for), but says nothing about partisan/political rants. Yet, it seems like that’s what the website does, and only that. Further everything you say appears to be entirely one sided

(right/conservative/republican is good, left/liberal/democrat is bad).

Is that the way you really see things? Or I am missing something? Thx. – Walter Tuvell (PhD, Math, MIT & U.Chicago – i.e., “not-a-crank”)

I counter-respond as follows:

First: I am not an “academic” (well-educated, yes, but worklife has been in the computer industry). Nor am I an American leftist, sycophant, familiar, university, show business, news media, etc. Rather, I’m just a guy looking for serious ethical guidance in uncertain times, of the sort Jack mentions/advertises on his About page (<https://ethnicsalarms.com/about>).

Second: My note was not, I think, an “accusation,” but rather an “observation,” based on the deviance of the website’s content vs. the wording of its About page. Granted I’m a relatively new reader, so don’t have the benefit of long-term familiarity, but from what I’ve seen to date, everything has decidedly political/partisan, in one particular direction (from left to right). That seems biasedly unbalanced (black-and-white, no gray) to me.

Third: 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 an non-political/partisan (though legally trained/savvy) ethicist thinks about. Start, say, with the “Smoking Gun” at <http://JudicialMisconduct.US/CaseStudies/WETvIBM/Story#smokinggun>.

Following this response, Marshall and Tuvell engaged in the following conversation in the comment section:

A

Jack Marshall

Thanks, Walter. I was hoping you would post.

Jack Marshall

And sorry for the mistake regarding your erudition. I come from a tradition where only scholars and academics attach their degrees and alma mater to their name. I know I don’t.

walttuvell

Right, Jack, you don't "wear your credentials on your sleeve," to your credit, which I generally agree with (though your bio does indicate you're a "Harvie (Harvard)," whereas I'm a "Techie (MIT)"). I only appended the "not-a-crank disclaimer" as a prophylactic, because "on the Internet, nobody knows you're a dog" ([https:// en.wikipedia.org/wiki/On_the_Internet_nobody_knows_you%27re_a_dog](https://en.wikipedia.org/wiki/On_the_Internet_nobody_knows_you%27re_a_dog)). The point being, that some sort of cred-establishment is more-or-less required upon an initial encounter, esp. on the Internet, where "everybody is a troll, until proven otherwise" (just like in Court, "everybody is a liar, until proven otherwise").

Jack Marshall

I know. Sorry, I was teasing. I am unusually anti-credentials. Some of the wisest, smartest people I know have none, and some of the biggest fools have an alphabet after their names. I am also disgusted with scholars, academics and alleged smart people right now. I shouldn't have taken it out on you.

I apologize, Walt; you didn't deserve the snark,

Just for that, you can call me partisan again.

The next day, on August 28, 2018, Tuvell, other readers of the blog, and Marshall engaged in a heated discussion in the "Morning Ethics Warm-Up: 8/27/17" post comment section. This conversation, which was essentially in **two discussion threads**, lasted until Marshall banned Tuvell from the website later that afternoon. The **first discussion thread** contained the following posts:

A

Red Pill Ethics

I mean it's nice of you to respond Walter, but Jack very clearly presented his case for why the ethics criticisms have been so one way – a large and sustained breakdown of ethics and reason in the left with many supporting examples. If you respond to anything I'd be most interested in hearing your response to that. Maybe something along the lines of an equivalent large and sustained breakdown of ethics and reason in the right with many supporting examples. If you can provide a good argument for that, then I'd 100% agree that the one sided coverage appears to show an ideological bent. If you can't... then maybe an apology is in order.

....

walttuvell

Red Pill Ethics: You say I should “apologize” if I don’t provide a case for (an examples of) large and sustained breakdown of ethics and reason on the right.

I have no idea what you’re talking about. It is not ME who supports OR denies any breakdown of ethics/reason on the left OR right. Thought, that appears to be what (all?) others here care about.

With the few short notes I’ve posted here, I’ve made it clear (but I’ll repeat again) that I care nothing about partisan politics, be it under the guise of “ethics” or just plain naked pot-calling-kettle-black. And I certainly won’t apologize for that.

To the contrary, I tuned into this site in the hope/expectation of finding a discussion of ethics, without the smokescreen of partisan politics clouding the air. I even proposed a topic, Judicial Misconduct, with examples (<http://JudicialMisconduct.US>). But no takers. Such things appear not to be what this site is about.

texagg04

“Such things appear not to be what this site is about.”

Then you should take the time to avail yourself of the 1000s of posts Jack has composed over the decade plus of his discussion group.

Jack isn’t partisan or biased. It’s just demonstrative of how far off the rails the Left has gone in it’s unethical conduct post election. And Jack IS frank about his view their their current insurrectionist and counter-constitutional mindset and conduct ARE the gravest threat to our nation.

So of course they seem to get more coverage. But that isn’t a bias problem of Jack’s.

walttuvell

I’ve already disclaimed my inexperience with this site, being a new-ish user of only a couple months’ standing. Unfortunately, from what I’m seeing, it’s doubtful that “taking the time” of absorbing the whole past of the site, as you suggest, will disabuse me of my initial assessments.

For, what you just wrote (and which you claim is representative of the site) is itself quintessential troll-like partisanship: “Everything Jack/we say is non-partisan, because the Left has gone unethically off the rails in their insurrectionist/counter-constitutional mindset/conduct, representing a grave threat to the nation.”

texagg04

So you're not going to even try?

Good strategy.

walttuvell

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

texagg04

Suit yourself.

Jack Marshall

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

walttuvell

Oh Come On, Jack, I did NOT "choose that precise issue," and you know it. I wrote a private note to you about "am I missing something," in thinking I was seeing mostly partisan-politics-pretending-to-be-ethics. THAT'S the "topic" I chose (expecting a simple private response). Instead, it got twisted (intentionally?).

The topic of THIS ("silliness") subthread is that some people think I should give some sort of apology, and/or some sort of arguments/examples about how the Left is better than the Right in some sense — "as if" I'm some kind of Leftist and believe that — because somehow I got tagged with being some sort of Leftist in some sense. But I've made no proclamations/hints whatsoever about being any such thing. Perhaps this happened because I was misperceived initially as an "academic," and some people somehow lump "academics" into the Left. Though in fact I've long disavowed being either Right or Left, and care nothing about it, because it's a silly tempest-in-a-teapot.

Why are you (and others) pretending otherwise?

Chris

Walt, some advice from one of this blog's leftists: Move on. Jack's blog is very valuable to me, and has taught me a lot about ethics. From my perspective most of his posts lately have been about politics, but that's because politics are a great window into the ethics of a country, especially at this moment in time. I *do* agree with you that Jack, like all people, has a bias, and I think he's been less careful about mitigating

that bias lately. But I've made a case for that when I've seen it, whereas you have just repeated it without really citing evidence for it. If you choose to stick around I hope you will do the same, but right now you're going in circles trying to justify your original comment, which, to me, was overly broad and unsupported.

The **second discussion thread** contained the following posts:

A

Jack Marshall

Walt, I'm not obligated to do this, but just for you, I picked the last full month of the blog, and kept score, running backwards, regarding whether a post criticized the left or the right. In doing so, I ignored the Daily updates, since they are mixed topics, and also decided to place criticism of President Trump down as criticism of the right, as he is technically a Republican. I did not score posts that did not involve politicians, government, new reporting or public policy debates.

I stopped after checking 16 posts, when the score was 8 to 8. I have done this before, with similar results. I'm sure, indeed I know, that there are periods when the balance is not this close, but I picked July 2017 at random. My survey simply does not support your claim. Neither would your own survey.

People are wedded to their own world view, come here, see that i designate some position that they have an emotional attachment to as based on unethical principles, and default to bias as an explanation.

Your claim is simply unsupportable on the facts, as is the claim that the blog is primarily political in nature. As I often note, the fact that the Left has inexplicably bundled issues and made it part of its cant does not make rejection of one of those issues partisan or political. Saying that illegal immigrants should get a free pass to the benefits of citizenship isn't liberal, it's idiotic and wrong. Holding that gay Americans shouldn't have all attendant rights of citizenship isn't a conservative position, it's an ignorant position.

You can believe what you choose; most people do. But I work extremely hard to avoid exactly the kind of bias you accuse me of, and I stand by the results. I am not always right, but when I am wrong, it is not because of partisan bias.

walttuvell

Unfortunately, you're misrepresenting me (see initial email) again, because all you doing is "keeping Left/Right score." I don't care about Left/Right anything! What I care about is Ethics per se, as opposed to partisan political rants of any kind, which is what appears to dominate

this site (and seemingly from the Right=Good point of view, but that's a sub-observation, not the main theme of my interest).

I was initially attracted to you because you're trained/savvy in the law, and I wanted to ask you opinion about the ethics of Judicial Misconduct, specifically in the sense of institutional abuse of the Summary Judgment process (e.g., <http://judicialmisconduct.us/CaseStudies/WETvIBM/Story#smokinggun>). You've done nothing to address that, and nobody on this site appears to have any inclination to so.

Fair enough. But at least please be straightforward about it, instead of twisting what I'm saying beyond all recognition.

walttuvell

Oh, and another thing: Why in the world did I ever think that Jack (and by extension this blog/website) might be interested in Judicial Misconduct?

Why, because it's advertised on the About page, of course: "I [Jack] specialize in legal ethics ..."

Jack Marshall

Or, you could search for judicial ethics, or judges, right on the blog! The last judicial conduct post was almost exactly a month ago. They come up when they come up.

texagg04

You sound more and more like another incarnation of a guy who would frequent this blog beating on ONE topic and ONE topic only...every thread that guy began seemed "new" but ended up ALWAYS redirecting to Supreme Court malfeasance and Judicial misconduct...

Hm.

He'd always get banned...

Then he'd always come back under another name.

walttuvell

Oh, yes. Damnation by (invalid) innuendo. Trying to twist my one-and-only post into a multiplicity of "threads." Very clever/subtle/bogus. NOT

Jack Marshall

I just banned Walt. Read my post about it. He's special.

Jack Marshall

I have already spammed two more posts by the jerk.

Marshall's post discussing the ban, which immediately followed the above thread, read as follows:

A

ATTENTION: Walt Tuvell is banned from commenting here.

I don't even care to spend any more time on him, but I'll give some background. He sandbagged me. He submitted nothing but whiny posts denying that he had accused Ethics Alarms of being obsessed with partisan political topics, then denied he had done that, then said the all he was looking for was a discussion of a judicial conduct issue (but did this initially with a link in a comment to another commenter, causing me to miss it) then just posted a comment saying that the blog advertised itself as covering judicial misconduct and doesn't (there are **dozens** of judicial ethics posts), and THEN, when I finally get the link to the ethics issue he says he was seeking a reaction to—**HINT**: if you want a reaction to a specific issue, the best way is to write me at jamproethics@verizon.net, and ask, "What do you think about this?" If it's a good issue, I'll respond like a good little ethicist and jump through your hoop.

But no, Walt began by accusing me of pure partisan bias, and issued bitching comment after bitching comment until, finally, he actually revealed his agenda, and GUESS WHAT?

Come on, guess!

Walt's "issue" is about **his own case**, and the link goes to **his single issue website**, which you can try to wade through here²

The case is **Tuvell v IBM**, and skimming his messy post that teeters on the edge of madness, I discern that the reason Walt is interested in judicial misconduct is that the judge decided that his case was lousy, and dismissed it. That obviously means that the judge is unethical.

I was going to, as a favor to Walt, because i am a nice guy, show my good faith by addressing his issue even *though he didn't have the courtesy or honesty of fairness to come right out and say what he wanted*. Then I read as much of the entry on his blog—which purports to be about judicial misconduct in summary judgments generally, but is in fact only about his case—as I could stand, and realized that Walt is, in technical terms—this is an opinion, Walt, not an assertion of fact, you

² In Marshall's post, a hyperlink to Tuvell's Judicial Misconduct USA website was at the word "here."

can't sue me: put down the banana— a few cherries short of a sundae. This became clear in this passage.

Tuvell suffered severe shock/dismay/devastation, and worse. For, Tuvell was/is a long-term victim of whistleblowing/ bullying-instigated PTSD, stemming from previous defamatory/ abusive workplace incidents he'd experienced more than a decade previously while at another employer, but which was since in remission ("passive"/"dormant" phase). Knabe/ Feldman's accusation immediately caused/"triggered" Tuvell to reexperience an acute/"active" PTSD "flashback"/relapse.

I used to get letters from people like this, long rambling things with court cites and exclamation points. I answer phone calls from people like Walt, and try to help them if possible, but it's usually futile, and often they keep calling and calling until I have to just duck the calls. And I get e-mails with long, rambling court documents. This is the first time, however, someone has abused Ethics Alarms for a personal agenda.

I'm sorry for Walt's troubles, but he was not honest, and misrepresented his purpose by the charming device of insulting my integrity. Obviously, he wanted to check and see whether my sympathies would be with his cause before submitting it for consideration. As I tell my clients, I can't be bought, and you take your chances.

Walt was also obviously looking for a cheap, as in free, expert opinion that he could use in his crusade against the judge.

What an asshole! The fact that he may be a desperate asshole doesn't justify wasting my time, and others who responded to him and misrepresenting his motives.

For this, Walt earns the ultimate ban. He will not be re-instated, and if he submits one more comment having been so warned, I will delete every one of his comments so the stench of his abuse no longer lingers here.

Can you tell that I'm ticked off?

(bold and italics in original).

III. Discussion

In his complaint, Tuvell brings a single claim for defamation based on statements Marshall made in his "Morning Ethics Warm-Up: 8/27/17" post (hereinafter, "Initial Post") and in the post's comment section (hereinafter "Marshall's Comments"), particularly the comment

titled "ATTENTION: Walt Tuvell is banned from commenting here." Tuvell asserts that the Initial Post falsely accused him of being an "academic" (a term Tuvell claims was intended as derogatory) and falsely attributed negative partisan traits to him, and that Marshall's Comments mischaracterized his email to Marshall, his own comments, the Judicial Misconduct USA website, and his lawsuit against IBM, and otherwise leveled inappropriate insults against him. As explained below, nothing in either in the Initial Post or Marshall's Comments can serve as a basis for Tuvell's defamation claim.

To withstand a motion to dismiss a defamation claim, a complaint must put forward allegations establishing four elements: (1) the defendant made a statement "of and concerning" concerning the plaintiff to a third party; (2) the statement could damage the plaintiff's reputation in the community;³ (3) the defendant was at fault for making the statement; and (4) the statement caused economic loss or is one of the specific circumstances actionable without economic loss.

See *Scholz v. Delp*, 473 Mass. 242, 249 (2015); *Driscoll v. Trustees of Milton Academy*, 70 Mass. App. Ct. 285, 298 (2007); *Eyal v. Helen Broadcasting Corp.*, 411 Mass. 426, 429 (1991).

Moreover, the alleged statement must "be one of fact rather than opinion." *Scholz*, 473 Mass. at 249. An expression of opinion "no matter how unjustified or unreasonable the opinion may be

or how derogatory it is" is inactionable unless it "impl[ies] the existence of undisclosed defamatory facts on which the opinion purports to be based." *Id.* at 249-250, 252-253 (internal quotes omitted).⁴ See also *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 267 (1993) ("Our

³ Put differently, the plaintiff must allege that defendant made a statement that "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." *Phelan v. May Dept. Stores Co.*, 443 Mass. 52, 56 (2004), quoting *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 853 (1975).

⁴ In other words, a statement which neither contains nor refers to objectively verifiable facts, and therefore cannot be proved false, is not actionable. *Scholz*, 473 Mass. at 250.

cases protect expressions of opinion based on disclosed information because we trust that the recipient of such opinions will reject ideas which he or she finds unwarranted by the disclosed information.”⁵ Rhetorical flourish or hyperbole is likewise inactionable. *Dulgarian v. Stone*, 420 Mass. 843, 850-851 (1995); *Lyons*, 415 Mass. at 266-267. In analyzing whether a statement is a fact or opinion, the court “examine[s] the statement in its totality in the context in which it was uttered,” taking care to consider “all the words used, not merely a particular phrase or sentence,” any “cautionary terms used by the person publishing the statement,” and “all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.” *Downey v. Chutehall Constr.*, 86 Mass. App. Ct. 660, 664 (2014).

With these principals in mind, the Court turns to Tuvell’s allegations of defamation. To the extent Tuvell’s claim is based on any of the statements in the Initial Post, the claim fails to satisfy the first element of a defamation claim – the alleged statement published by the defendant was “of and concerning” the plaintiff. This element can be satisfied by showing that “either that the defendant intended its words to refer to the plaintiff and that they were so understood [by a third party], or that the defendant’s words reasonably could be interpreted to refer to the plaintiff and that the defendant was negligent in publishing them in such a way that they could be so understood.” *Driscoll*, 70 Mass. App. Ct. at 298, quoting *Eyal*, 411 Mass. at 430. Here, the Initial Post did not mention Tuvell by name or provide any other identifying information about

⁵ *Lyons* provides a helpful example of the difference between actionable and inactionable opinion: “[I]f I write, without more, that a person is an alcoholic, I may well have committed a libel prima facie; but it is otherwise if I write that I saw the person take a martini at lunch and accordingly state that he is an alcoholic.” *Id.* at 262, quoting Restatement (Second) Torts, § 566 (1977).

him, and Tuvell has not put forward allegations indicating that the readers of Ethics Alarms understood the post to be referring to him specifically at the time it was published.⁶ Indeed, the allegations in the complaint and readers' comments to the Initial Post, indicate that readers only learned that Tuvell was the author of the email discussed in the Initial Post after Tuvell *himself* voluntarily disclosed this information. Accordingly, the statements in the Initial Post cannot be the subject of a defamation claim. See *Driscoll* 70 Mass. App. Ct. at 298 (no claim for defamation where plaintiff not mentioned by name in communication); Cf. *Reilly v. Associated Press*, 59 Mass. App. Ct. 764, 777 (2003) (statement was "of and concerning" plaintiff where plaintiff "only person identified in the article").⁷

As for **Marshall's Comments**, those statements likewise cannot serve as a basis for Tuvell's defamation claim because they can only be reasonably understood as expressions of opinion rather than fact. 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. See *Scholz*, 473 Mass. at 252 (fact that statements made in an entertainment news column indicated that they were

⁶ Marshall's reference to the email he had received from a reader served only as a means for Marshall to transition to a much broader discussion, namely, the perceived ethical lapses of the political left, a topic unrelated to Tuvell.

⁷ Tuvell takes particular issue with Marshall's statements in the Initial Post that the author of the email was an "academic" and that the "American Left" (which includes academics) "have gone completely off the ethics rails since November 8, 2016." Even if Tuvell had been identified as the author of the email, these statements could not serve as a basis for a defamation claim. The term "academic," even when used in this context, cannot be properly viewed as a statement that "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" and is therefore not defamatory. *Phelan*, 443 Mass. at 56 (emphasis added). Moreover, Marshall's assertion that the American Left has "completely gone off the ethics rails" is protected rhetorical hyperbole and opinion. It is an observation that can neither be proven true nor false in any definitive sense.

cf. fn.3
supra

opinion). Furthermore, these opinions were based on disclosed information. 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. Marshall's readers, therefore, were fully aware of the basis for Marshall's opinions on these topics and were able to assess whether Marshall's opinions were warranted.⁸ See *Scholz*, 473 Mass. at 253-254 (statements in articles that allegedly insinuated that plaintiff was responsible for a suicide constituted inactionable opinion because articles "lay[ed] out the bases for their conclusions" and therefore "clearly indicated to the reasonable reader that the proponent of the expressed opinion engaged in speculation and deduction based on the disclosed facts.") (internal quotations omitted); *Lyons*, 415 Mass. at 264-266 (article stating that plaintiffs' picketing held a political convention "hostage" and which advanced various explanations for picketers' motives was inactionable opinion because it was based on nondefamatory facts disclosed in the article).⁹ 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.

⁸ Marshall's statement that "the judge [in *Tuvell v. IBM*] decided that his case was lousy" is clearly based on the information found on Tuvell's Judicial Misconduct USA website, rather than his reading of the judge's rulings in the case.

⁹ To the extent Tuvell complains about Marshall's statements that he was "special," "a jerk," an "asshole," "a few cherries short of a sundae," and the like, those statements were also opinions based on disclosed information, or constituted rhetorical hyperbole that could not be reasonably interpreted to state an actual fact. See *Tech Plus, Inc. v. Ansel*, 59 Mass. App. Ct. 12, 25 (2003) (statement that plaintiff was "sick," "mentally ill" and "lived with two hundred cats" was, in context, protected as rhetorical hyperbole); *Fleming v. Benzaquin*, 390 Mass. 175, 180-181 (1983) (statements that state trooper was a "little monkey," "tough guy," "absolute barbarian," "lunkhead," "meathead," and "nut" were non-actionable); *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir.), cert. denied, 504 U.S. 974 (1992) (description of theater production as "a rip-off, a fraud, a scandal, a snake-oil job" was "obviously protected hyperbole").

IV. Conclusion

For the reasons set forth above, Tuvell has failed to state a claim for defamation and Marshall's motion to dismiss is **allowed**.



Christopher K. Barry-Smith
Justice of the Superior Court

DATE: August 13, 2018

ANNOTATIONS

- 1A • The full story of this case (with all documentation, including this instant **Annotated Opinion**, which we denote **OpAnn**), is **available online** at <http://judicialmisconduct.us/CaseStudies/TUVELLvMARSHALL>. Herein we use these abbreviations:

Comp = Plaintiff's Complaint (Sep 13 2017).

Diss = Defendant's Motion to Dismiss (Oct 16 2017).

Opp = Plaintiff's Opposition to Diss (Oct 25 2017).

OppExhA = Opp Exhibit A (Oct 25 2017).

OA = Oral Argument (Jun 7 2018).

OATAnn = OA Transcription, Annotated.

Op = Judge's Opinion (Aug 13 2018).

OpAnn = Op Annotated (this very document).

AnnNL = Annotation Number *N* Letter *L* in this very OpAnn.

- 1B • That original email of Aug 26 2017 — as (i) originally sent via email, and as (ii) reproduced/posted on Marshall's website, and (iii) at Op_φ4-5 — is discussed in detail at Ann2A *infra*.

All the postings on Marshall's blog relevant to this action — except for the two that Marshall peremptorily/unilaterally destroyed, apparently unrecoverably, see Opp_φ14f21 — were filed with the Court (and hence properly included in the record on this Appeal), in the document called OppExhA (34 pages). See Op_φ2f1.

- 1C • "Failure to state a claim" = **Massachusetts Rules of Civil Procedure (MRCP)** 12(b)(6), as mentioned at Op_φ2.

Marshall's two other pretended arguments presented for dismissal — regarding MRCP 12(b)(5) "registered mail," and MGL 93A "demand letter" — were utterly false/bogus, as proven at Opp_φ9-10 and OATAnn_φ18.

2A • Concerning the original email of Aug 26 2017: The **body content** of that initial private email from Tuvell to Marshall — but **missing** both its **subject-line** and its **signature-line** {TBD right?} — is reproduced at Op ϕ 4-5.

But in the OppExhA ϕ 7 version of the original email submitted to the Court (which the Op purported to be reporting), the initial email's **signature-line** is included, and it reads: “— Walter Tuvell (PhD, Math, MIT & U.Chicago — i.e., ‘not-a-crank’).” This language signals that important part of this signature-line, i.e., the very *reason* Plaintiff included it at all, is the part that reads, “i.e., ‘not-a-crank’.” Thereby, Tuvell established to Marshall his credentials as “not just any old random nut on the Internet,” as Tuvell did explain to Marshall, see OppExhA ϕ 32.

The initial email's **subject-line** was never included on Marshall's blog (OppExhA). That original subject-line read: “I can't figure you you” (in the “first original” email, dated 2:09 p.m. Aug 26 2017). However that was a typographical error, which was proactively corrected by Tuvell (in the follow-up “second original” email, dated 4:56 p.m. Aug 26 2017) to the intended wording: “I can't figure you out.” It turns out, unexpectedly, that this subject-line has some importance, as it helps establish Tuvell's approaching Marshall as motivated by inquisitiveness, not animus (which “goes without saying,” and wasn't recognized as important until just now).

The full/verbatim original email (both first and second versions) is now included in this OpAnn, in the Appendix at ϕ 23 *infra*.

3A • OppExhA ϕ 1-2. Called Marshall's “Initial Post” at Op ϕ 12.

4A • OppExhA ϕ 6-7.

5A • OppExhA ϕ 8,32.

- 6A • OppExhA_φ8,9-12.
- 9A • OppExhA_φ12-13,14-15.
- 11A • OppExhA_φ15-16.
- 12A • OppExhA_φ1-2. See Op_φ3.
- 12B • OppExhA_φ5-34. This includes the excerpts at Op_φ4-12.
- 13A • By critiquing Marshall’s Initial Post, in any manner, the Judge is “posturing” himself, falsely stating Plaintiff’s claims. Namely, while the Plaintiff does make (correctly) the assertions mentioned by the Judge here regarding Marshall’s Initial Post (in particular, that the “academic” attribution *was* intentionally derogatory/defamatory in the *context of that particular audience*, hence marked with a “†” tag at Comp_φ5¶8), **no claim of actionable defamation has ever been made** by Plaintiff as to that Initial Post (because that Initial Post was not identifiably “of and concerning” him, as Plaintiff already *stated explicitly* at Opp_φ12f18). Instead, the importance of the Initial Post is that it promulgated **false facts** (defamatory, albeit non-actionable) to the audience, which the audience “believed,” thereby intentionally **polluting/sliming/prejudicing** Plaintiff in the eyes of (certain/most members of) the audience — and *upon that basis* (certain/most members of) the audience (Marshall and others) then committed *other actionable* defamations upon Plaintiff.

We can say more about Marshall’s “academic” thing. Namely, why did Marshall attribute the “academic” characteristic to Tuvell at all? Marshall himself proffers this answer (OppExhA_φ8): “I come from a tradition where only scholars and academics attach their degrees and *alma mater* to their name.” But that is transparently false (he’s making it up on the spot), for at least two reasons. (i) One rea-

son it's false is that no such "tradition" exists (academics never advertise their degrees and *alma mater*, say on the walls of their offices, but doctors and lawyers usually do). (ii) But the other reason it's false is Marshall's absurd "PhD implies academic" implication. For, while definitive numbers are difficult to come by ({TBD ref}), no reliable source estimates that as many as 10% of PhD's enter/remain in academia. This vast disparity (10-to-1 ratio) falsifies Marshall's impliction, and is too wide to chalk up to an "innocent misconception" on Marshall's part. So there must be some other explanation. And the only explanation I can think of is that Marshall "Googled" Tuvell, visited his Judicial Misconduct website, and decided for some reason (perhaps because he *likes* rampant Judicial Misconduct, because that generates more wealth for lawyers like himself) to attack Tuvell. So, he decided to "slime" Tuvell on his blogsite, by pretending he was a hated "academic," thereby "forcing" him to be a member of the dreaded American Left in the eyes of his audience. And that amounts to *defamation* (albeit non-actionable *per se*). (This conjectured explanation cannot be proven at this Motion-to-Dismiss time, but must await further interrogatories/discoveries/depositions for its explication/resolution.)

- 13B • These are the **standardized four "hornbook" elements/criteria** of a cause-of-action for defamation (though languaged according to the cases cited by the Judge). See OATAnn^e3.
- 13C • *Tendency/potential* of harm to reputation is all that's required (*actual* damage to reputation is not necessary to allege or prove).
- 13D • The "fact vs. opinion" issue (*vis-à-vis* defamation) is discussed at great length in OATAnn *passim*. It gets very tricky, and remains the biggest sticking point in all of defamation law (see Opp^o4f4,5).

- 13E • This is misleading/incorrect/untruthful (absent additional context/argument), even though the Judge relies upon it in his Op. Namely, it is *not* the case that “actionable opinion *must* be based upon *undisclosed* defamatory facts” (though it will often/usually be). The correct statement is: **“to be actionable as defamation, an opinion must be based upon some underlying defamatory facts, be they either (i) disclosed or (ii) undisclosed, whether true or false.”** *Milkovich v. Lorain Journal Co.* (see OATAnn e19).

Example: Suppose John has never stolen a car. Then the naked (false) statement “I opine John is a car thief” is an actionable opinion based upon (ii) *undisclosed* defamatory facts. But a speaker *also* utters an actionable defamatory opinion statement based upon (i) *disclosed* facts by: *first* saying “I saw John steal a car” (which is an actionable defamatory *fact* statement); and *seconf* saying “Therefore I opine John is a car thief.” (Because, the second statement *repeats* the defamatory content of the first, thus satisfying the four standard hornbook criteria of Ann13B *supra*.)

- 13F • This is misleading/incorrect/false (absent additional context/argument). Namely, the clause “and therefore cannot be proved false” is unsupportable/wrong — because, in the common brief paraphrase: “You can’t prove a negative.”

Example: Continuing the same example from *supra*, suppose John is not a car thief. Then the statement “John is a car thief” is defamatory, even though it “cannot be proved false.” For, there exists no universal/trusted/queryable database that completely records/proves *all* of John’s life acts/events, such as “nonstealing of cars.”

- 14A • “Information” here means “*true* facts.” That is: “false factual statements” do not constitute “information” for purposes of defamation

law. The defamer/opinionator cannot be permitted to rely upon “false facts (disclosed or undisclosed),” as discussed in Ann13E *supra*.

- 14B • This long citation about “analyzing a (fact or opinion) statement *in context*” can be short-circuited (that is: context need not be considered) if the statement is an *objectively/provably false* statement of fact, or is an opinion based upon an *objectively/provably false* statement of fact. Because: “objectively/provably” means “independently of (i.e., ‘in every’) context.”
- 14C • Oh my God, why do I have to keep repeating this? There was never any contention that the Initial Post was actionable (Ann13A *supra*). So why does this Judge persist in self-puffing himself up, by pretending to scotch something that was never even claimed?
- 15A • **The Judge writes falsely here, twisting/distorting/falsifying Tuvell’s pleadings.** Far from “taking particular issue” (as the Judge falsely pretends), and as already noted (Ann13A,14C *supra*), there is of course no claim that Marshall’s Initial Post *per se* is actionable. Instead, the claim is that Marshall intentionally **infected/polluted/poisoned** the audience, by propagating **false facts** (“academicism”), which he negligently/falsely/maliciously pretended-to-assume about Plaintiff, to an audience (mostly of “right-wing wing-nuts,” as opposed to “left-wing moon-bats,” in the slang vernacular) that he knew to be predisposed to viewing “academicism & Left Wing” very negatively (and which he himself expressly admits/explicates, see Ann15B *infra*). That this latter claim (“the audience viewed ‘academicism & Left Wing’ very negatively”) is true/correct is quite clear/plain, upon any casual perusal of OppExhA as a connected whole (“in context”).

15B · The (false) attribution of the concept/term “academic” to Tuvell is key to these events (independently of whether it is *actionably* defamatory; see the concept of “material falsity” *infra* in this Ann15B), because it started everything off on the wrong foot, strongly “setting the tone” for everything that followed — and, the Judge’s whole sentence here is untruthful, and he **misstates/falsifies Plaintiff’s argument**. For, here’s what the Judge writes (emphasis in original): “The term ‘academic,’ even when used in this context, cannot be properly viewed as a statement that ‘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’ and is therefore not defamatory.” **That is provably false.** *Proof (in three steps):* (i) Using the Judge’s same “community/segment” language, the “community” involved here is “the membership/readership/followership of Marshall’s Ethics Alarms blog” (not to mention the “searchship/Googleship of the Internet at large”), and the “segment of the community” is “the commentership of the blog entry in question;” and the Judge does/can not offer any evidence/proof that either of these is “inconsiderable and/or disrespectful” (see the numerical estimates of community size at OATAnn_φ14e79, which, albeit inexact/imprecise, are certainly not “inconsiderable and/or disrespectful,” by any reasonable/rational definitions). (ii) Many/most/all members of the just-stated commentership segment *did indeed* clearly/plainly/obviously “actually (not just ‘tendency/potentially’) hold the Plaintiff up to scorn, hatred, ridicule or contempt in the[ir] minds,” as any causal perusal of OppExhA shows. (iii) The characterization of “being an academic” is “defamatory when used in this context (*viz.*, ‘this Ethics Alarms community/segment’),” because Marshall did not *only/merely* “use” “the term academic” (*without more*, it just means “member/professor/researcher of the academy/

university/college/teaching professions,” see <https://en.wikipedia.org/wiki/Academy>), but rather he *did* “supply more” by actually going further and *expressly explicating his intended (defamatory) contextual implication of “academicism*, thusly:” “the **fact** **[he claims, not ‘opinion,’ and his followers/acolytes happily believe it!]** that the entire American Left, along with its sycophants and familiars, the **universities** [hence the “academic” connection], show business and the news media, have gone completely off the ethics rails since November 8, 2016” (OppExhA_φ1-2, emphasis added). This is *hate speech*: “incitement to riot.”

In fact, this is exactly the kind of thing the Supreme Court is talking about, by recently reviving its defamation concept of **material falsity** (“**effect on reputation of defamee in the context/ minds of the relevant audience**”) in *Air Wisconsin v. Hoeper* (see OATAnne18‡): the concept of “academics being members of the American Left, hence ‘bad’” is very much endemic throughout Marshall’s blogsite, and it directly caused Tuvell’s hardships there. That is obvious, just by any casual perusal of OppExhA in its entirety/context.

In particular, in the quotation the judge cites, he explicitly adds emphasis to the phrase “*considerable* segment of the audience.” That word refers to the “quantitative numerical/percentage measure/fraction” (see the quotation from *Ingalls v. Hasting & Sons* in Ann15C *infra*, which speaks of a “considerable part” of audience) of the relevant audience/community, and it’s a very weak hurdle, basically meaning “not just one/two/few extreme ‘eggshell skull’ outliers who may profess to be ‘shocked, shocked’ by even the most mild of criticisms/defamations.” In our case, the “relevant audience” is “the people following/reading/commenting the website/blogpost (OppExhA)” — and not “the whole entire world.” Again, just by calu-

ally reading/perusing OppExhA, it can be seen that Marshall's "academicism" attribution/slur did indeed infect/pollute/poison a "considerable" fraction (*all but one/two/few*) of that audience. (Anyway, that "considerable amount" is a fact question, which a judge cannot "guess" at Motion-to-Dismiss time.) So the Judge is lying.

As for the "respectable" part of "considerable and respectable" audience: *Sack* §2.4.3 speaks of this as "Right-Thinking People." I presume the Judge will grant that criterion is satisfied. Alternatively, does he really want to argue that Ethics Alarms consists of Wrong-Thinking People?

15C · It's obvious **to me, and seemingly to the Judge**, that Marshall's "observation" about the American Left is "mere observation/opinion," hence not actionable as defamation. However, *this is not the case with the audience/community of interest here*: Marshall expressly portrays his observation as **true fact** (see Ann15B *supra*), and **his audience** accepts it as such (noting that Marshall "is God" to his followers, see OATAnn_φ24,e130), to deleterious effect upon Plaintiff's reputation. But in any case, Plaintiff has never given any hint of a scintilla of an iota of complaint/actionability of defamation about Marshall's harangue against "the American Left." This is very obvious, by reading everything Plaintiff has ever written about this case. In particular, Plaintiff was at pains to very explicitly disassociate/abjure himself from any interest whatever in politics/partisanship of any kind in the original blog interactions (as a casual perusal of OppExhA shows). So, again, why is this Judge abusively puffing himself up here, pretending to "defeat" Plaintiff in some ridiculous/nonexistent sense?

BUT ... THAT ("American Left has gone completely off the ethics rails") is not even the point of what Plaintiff is complaining about. I.e., the Judge is **lying, (intentionally) misstating/falsifying**

Plaintiff's argument. Because, instead (as the Judge knows well), Plaintiff's argument has been given already in Ann15B *supra*, and we *repeat* it here again, as a syllogistic implicatory sequence, as intended by Marshall and as received/accepted by his audience: (i) Plaintiff is an academic. (ii) All academics are "sycophants/familiars/members" of the American Left. (iii) The entire American Left has gone off the ethics rails. (iv) Therefore, Plaintiff has gone off the ethics rails. **That is defamatory (read as a whole, in context). For, (i-iii) are all "facts" (so portrayed/declared/disclosed by Marshall, and received by his audience), while (iv) is "defamatory 'opinion' based upon those facts" — at least one of which, (i), is certainly false (and (ii-iii) are almost-certainly false, if there were measurable), hence the opinion is unprotected/actionable.**

And finally, not only was the Judge wrong here (as just proven), but we further note the Judge *cheated/swindled* Plaintiff, in the sense that **the Judge is incompetent/powerless to decide^t** the defamatory effect upon the community/audience, which is what the Judge has done here. That authority/competence resides only in the audience/community itself (and later, the jury). As *Sack* §2.4.3 puts it (emphasis added): "Communications are judged on the basis of the impact that they will probably have on those who are **likely to receive them**, not necessarily the ordinary 'reasonable man'." Or again, as Massachusetts put it: "[A] writing is a libel if, in view of all relevant circumstances, it discredits the plaintiff in the minds, **not of the court**, nor of wise, thoughtful and tolerant men, nor of ordinarily reasonable men, but of any 'considerable and respectable class in the community.' The emotions, prejudices and intolerance of mankind [including "mob/herd/riot mentality" situations, as with the case-at-bar] must be considered in determining the effect of a publi-

cation upon the standing of the plaintiff in the community. The question, therefore, whether a publication is defamatory or not, being dependent upon the effect produced upon the public or a *considerable part* of it, is one **particularly fit for trial by jury [not for the judge].** — *Ingalls v. Hastings & Sons*, 304 Mass. 31, 33 (1939, cites omitted, emphasis added). And, it's all the more improper for *this* particular judge to be dismissing this case, given his blatantly biased conduct the Oral Hearing on this Motion to Dismiss (to which we now insistently draw the attention of this Appellate Court; see all the annotations in OATAnn). {† • We do note, however, that it is a threshold question of law whether a statement is *possibly capable of* defamatory import (as opposed to the *actual* effect on the audience). In the instant case, at Ann15B *supra*, the judge spoke of the effect on the audience, which was forbidden for him to do; while in this Ann15C he speaks of the possibility of “defamatory impact upon the ‘American Left’,” which is an irrelevancy (as we’ve noted), and we have no quarrel with it. The affirmative *possibility/potentiality* of defamatory impact upon the Tuvell audience is demonstrated by the syllogism *supra*. In this connection, we note too that defamation *per se* (such as Plaintiff’s “theft of professional services” charge, see OATAnn_{¶27,e134}) is *exempt* from these potentiality-of-defamability considerations, because defamability can/must be *automatically granted/assumed* for *per se* defamatory statements. }

- 15D • This (“only reasonable understood as expressions of opinion rather than fact”) is stupidly false. The statements Plaintiff complains-of are all **based upon (i.e., “imply,” as precedent) underlying facts (disclosed or undisclosed, true or false).**

This whole “opinion vs. fact” thing has always been the trickiest area of defamation law, and has been extensively (though it can

never be exhaustively!) discussed at the Oral Argument and in its annotations (OATAnn, *passim*, to which we insistently refer this Appellate Court). See particularly the discussion there of Plaintiff's **Top Five Defamations** (summarized briefly at OATAnn133) — which the Judge in this Op sneakily refuses to address individually/directly, instead breezily/falsely broad-brush handwaving/wishing them away by pretending “they’re all about pure opinion, with zero factual content/foundation/implication, hence protected from actionability.” He’s lying.

- 15E • It’s only a “personal blog” in the limited/cramped/colloquial sense that Marshall runs it and is responsible for the content he himself posts. But to call it “personal” doesn’t use language the way the Internet uses it. In Internet language, Marshall’s blogsite allow wide commentation, which is not “personal” — it is instead an interactive/collaborative membership/comment-based *shared/nonpersonal* blogsite (albeit with Marshall as the primary owner/leader/bigdog, as is typical for such blogsites).
- 15F • Yes, Marshall does “share his views on ethics, politics and other matters,” but that’s not what we’re talking about here, is it? The “matters” Marshall wrote concerning Plaintiff, which Plaintiff complains-of in this case-at-bar, are instead very targeted to-the-person (*ad hominem*) attacks, and have nothing whatever to do with “ethics, politics, etc.”
- 15G • Well, in one sense, Marshall’s statements did “expres his opinion” — but only in the loose/naïve sense of everyday language, **not** in the sense of defamation law or of legal ethics (Marshall’s specialty), which is what’s relevant here. Marshall’s statements are **definitely not** in the legally protected category of “pure/unadulterated/fact-

free opinion, entirely devoid of any factual basis or contextual factual implication.” That’s essentially impossible anyway (see OATAnn *passim*, beginning with, say, OATAnne18).

- 16A · This assertion by the Judge (“opinions were based on disclosed information,” recalling that “information” means “true/accurate facts,” Ann14A *supra*) is very false/untruthful (or at least very falsely misleading, depending on exactly what the Judge means, noting that he “handwaves” rather than explaining himself). Namely, *all* of Marshall’s opinions are *based* upon either (i) disclosed *false* facts, or (ii) *undisclosed* facts — both of which render the opinion unprotected/actionable (Ann13E *supra*). (Not to mention that the Judge is being falsely prejudicial here by using the word “information,” which is generally reserved in defamation law to mean “*true* facts,” see Ann14A *supra*).

The core problem here for the Judge is that he is being entirely “conclusory” — “*Expressing a factual inference without stating the underlying facts [or chain of inferential reasoning] on which the inference is based*” (Black’s Law Dictionary 7th). Namely, the Judge makes a bald dispositive assertion — “opinions [~57 of them!] were based on disclosed information” — which requires *proof* (namely: what exactly was/were the “disclosed information” upon which the “opinions” were based??) — but he doesn’t bother to back it up by providing any detailed/underlying facts. Whatsoever. In the least. Not even a single detail. Not one. Even though the ~57 instances of defamation (in Comp) each demand (by law) to be addressed individually. (*Hint*: No such “disclosed information” actually exists, as proved *infra*. in this Ann16A.) **This is clear abuse of judicial process.** And, since **the Judge is clearly quite false/untruthful about his conclusory assertions,** this amounts to **Judi-**

cial Misconduct. We prove this now.

As a prerequisite to the remaining discussion in this Ann16A, we preliminarily refer to the discussion at Oral Argument concerning Plaintiff's **Top Five Defamations**, OATAnne133, which we implore this Appellate Court to review at this point. That said, we now continue that discussion as follows, by zeroing in on the *deep details* of *just one* of those five (this example was called an "excellent example" at OATAnne35; another example, not one of the Five Top Defamations, is addressed at Ann16D *infra*):

Here Is Just One Example (*e pluribus unum*): Consider Marshall's accusation of "**theft (attempted) of professional services**" (which is defamatory *per se*, see OATAnne134(δ)). It occurs at OppExhA_φ16, in these words of Marshall:

"[Tuvell] was not honest, and misrepresented his purpose by the charming device of insulting my integrity. Obviously, he wanted to check and see whether my sympathies would be with his cause before submitting it for consideration. As I tell my clients, I can't be bought, and you take your chances. Was was obviously looking for a cheap, as in *free*, expert opinion that he could use in his crusade against the judge."

Analysis/Proof: The above accusation by Marshall is *not* "pure/fact-free opinion" as the Judge pretends (which would protect it from actionability), but rather contains the following *seven factual bases* (disclosed or undisclosed, true or false, see Ann13E *supra*) and/or *implications*, all of which are defamatory, which makes all seven of them actionable:

(i) To say "Tuvell was not honest" is a *statement of fact*. Namely, it implies the existence of "something" Tuvell did/said/wrote that "was not honest." What was that "something" exactly, and in exactly what way was it "not honest?" ***Hint: You can't find it; a true/correct/***

factual basis doesn't exist in OppExhA. (Note that accusations of dishonest are defamatory *per se*.)

(ii) To say "misrepresenting his purpose" is a *statement of fact*. Namely, it implies the existence of "something" that was Tuvell's "purpose." What was that "something" exactly, and exactly how did he "misrepresent" it? Hint: You can't find this; true/correct/factual basis doesn't exist in OppExhA.

(iii) To say "insult my integrity" is a *statement of fact*. Namely, it implies the existence of "something" that Tuvell did/said/wrote to insult Marshall's integrity. What was that "something" exactly, and in exactly what way did it insult Marshall's integrity? Hint: You can't find this; true/correct/factual basis doesn't exist in OppExhA.

(iv) To say "check where Marshall's sympathies would be" is a *statement of fact*. Namely, it implies the existence of "something" Tuvell did/said/wrote that checked where Marshall's sympathies (whatever that means) would be. Exactly what was that "something" and how exactly did it "check his sympathies?" Hint: You can't find this; true/correct/factual basis doesn't exist in OppExhA.

(v) To say "I can't be bought" is a *statement of (implied) fact*. Namely, it implies the existence of "something" Marshall was "selling," and that Tuvell was somehow attempting to "acquire" it without properly paying for it. What exactly was the "something" that Marshall was selling (was it "sympathies" as in (iv), or "expert opinion" as in (vi), or something else?), and how exactly did try to acquire it? Hint: You can't find this; true/correct/factual basis doesn't exist in OppExhA. (Note that Marshall does peddle his expert/professional services on his *other/business* website, ProEthics, see OATAnne35, but does not do so on his Ethics Alarms blogsite.)

(vi) To say "looking for cheap/free expert opinion" is a *statement of (implied) fact*. Namely, it implies (from context, see (v)) the exis-

tence of “something” (presumably “expert opinion”) which Marshall was selling, but which Tuvell was underhandedly/improperly attempting to acquire cheaply/freely. What exactly was that “something” (was it perhaps related to “expert witness” services, or to an expert *amicus* brief?), and in exactly what way was it for sale, and in exactly what way did Tuvell attempt to underhandedly acquire it cheaply/freely? Hint: You can’t find this; true/correct/factual basis doesn’t exist in OppExhA. Note that all of Marshall’s opinions on his blogsite (as opposed to his other/business website, but he doesn’t publish any opinions at all) are advertised only as “plain” opinion (not “expert opinion” — the word “expert” does not appear on his About page, and the word “professional” appears only in connection with a certain theater company). In fact, Marshall explicitly states, concerning his Ethics Alarms web/blogsite: “[N]one of the opinions here should be taken as legal opinions [presumably meaning “expert opinions,” because Marshall certainly doesn’t produce what are normally called “legal/judicial/court opinions,” which employs an entirely different meaning of the word “opinion” altogether, unrelated to defamation law], because they aren’t.”

(vii) To say “could use in his crusade against the judge” is a *statement of fact*. Namely, it implies the existence of “some way” in which the “something” that Marshall was selling could be “used” against the judge. Exactly what was that “some way?” Hint: You can’t find this; true/correct/factual basis doesn’t exist in OppExhA. Note that at all times relevant here, Tuvell’s Judicial Misconduct proceeding against the judge was “closed,” that is, it was literally forbidden/impossible (under the Judicial Misconduct Rules) to inject/intervene any third-party production of any kind into the proceedings. (And too, Tuvell’s underlying case, *Tuvell v. IBM*, was “closed” in the even stronger sense of not being active at all, but of course

Tuvell was never interested in discussing that case with Marshall, he was only ever interested in discussing his Judicial Misconduct case.)

Conclusion: Look back at each of those phrases, just written: “Hint: You can’t find this; true/correct/factual basis doesn’t exist in OppExhA.” What those mean is that, since the (true/correct/factual) answers to *all* of the questions above (by any reading of OppExhA, no matter how loose or close) **just plain do not exist** in OppExhA, then the (true/correct/factual) answers are implicit/unclear/conjectural/undisclosed. Go ahead, please try this exercise for yourself, right now — the only raw data you need for this exercise is right there before your very eyes, in OppExhA. **The “basis” sought/required must come from some one of Tuvell’s 10 posts, listed on the introductory page of OppExhA, “OppExhA_{φ0}” so-to-speak. But the required basis just plain does not exist.**

Given that such bases do not exist, if one further tries taking the next exercise of **conjecturing** (as the Judge is *not even permitted* to do at Motion-to-Dismiss time, because the Judge must *blindly assume* all allegations and interpretations in favor of the Plaintiff, as the Judge says at Op_{φ2}) about what the *potential/possible bases might conceivably be (inside or outside of OppExhA)* for Marshall’s behavior, they *all* turn out to boil down to *false* statements of fact (as Plaintiff knows them to be, and as he can prove to an impartial jury, but apparently not to a partial Judge), (i) One such conceivable conjecture being that “Marshall inadvertently misread/misinterpreted/twisted Tuvell’s writings/posts.” (ii) Another conjecture is that “Marshall intentionally misread/misinterpreted/twisted Tuvell’s writings/posts.” (iii) And yet another conjecture is that “Marshall invented arbitrary answers, because that suited the ranting he wanted to do that day”).

Therefore (by the “opinions based on undisclosed and/or false defamatory facts” principle, see Ann13E *supra*), Marshall’s accusation(s) about “theft of professional services,” as listed/analyzed in this example, are all *actionably defamatory*. QED.

16B • The Judge is saying here that “the audience was fully aware of the bases for Marshall’s opinions, because those bases were present in Tuvell’s comments on the blog (OppExhA).” **THAT IS OBJECTIVELY FALSE — as was just proven** (for one example, in Ann16A *supra*). Whatever the bases for Marshall’s statements were, they simply **do not exist** on the blog. Tuvell’s comments on the blog **do not support/match Marshall’s defamation, period**. So, whatever Marshall’s bases are, they are/remain **undisclosed. Period**.

16C • No, Marshall’s readers were *not* “able to assess Marshall’s opinions,” because the underlying true/correct/factual bases for his opinions were *undisclosed*, as just proved (Ann16B,C *supra*).

16D • *The “‘lousy’ case” example (OATAnn_o19-21,e37-38)*. No. The Judge is engaging in ridiculous/nonlegal/false/untruthful (in bad faith) reasoning in his footnote 8. For multiple reasons:

(i) In the first place, the Judge is here explicitly putting a **burden on the audience that has never heretofore been imposed in defamation law**. Namely, he’s saying, “a statement is not actionably defamatory provided that the audience can ‘just go look it up’ on the Internet (or elsewhere).” In other words, he’s expanding the concept of “disclosed facts” to encompass “discoverable facts, depending upon the investigatory resources of the audience.” That’s absurd (it’s not at all what “disclosed facts” means in defamation law), and has been dealt with at OATAnne143.

(ii) In the second place, *even if* audience members were to access “the information found on” Tuvell’s website (as the Judge

thinks is incumbent upon them, see (i)), they would have no idea exactly *what parts* of that website Marshall based his “lousy” opinion on. So, that means they’d have to comb through Tuvell’s website with a fine-tooth comb, trying to ferret-out the basis of Marshall’s “lousy” opinion. Which is a *huge* burden. And even then, they couldn’t be certain that the information they found was exactly the information Marshall relied upon for his “lousy” opinion.

(iii) In the third place, *even if* audience members were able to find the exact information information just discussed (in (ii)) that Marshall relied upon, they’d have no way of knowing exactly how he *interpreted* that information (the Judge calls it “his reading”), and in particular they’d have no way of knowing *why* Marshall called Tuvell’s case “lousy” (i.e., whether it was warrantedly justified, based upon a valid reasonable interpretation, or was just off-the-wall intentional defamation — i.e., a “true/accurate/correct fact” or a “false/defamatory non-factual misinterpretation”).

(iv) In the fourth place, we need to be careful about *to whom* Marshall is attributing the assessment of “lousy” (because Marshall doesn’t make it clear): is he saying that the District judge herself assessed the *Tuvell v. IBM* case as “lousy,” or that Marshall himself is now assessing the case as “lousy?” That question is not “disclosed,” but it’s answerable, by noting that that judge in that case nowhere said anything close to “lousy” (such as “frivolous,” or “without merit,” or some other such judge-like language), therefore it is certainly Marshall himself who is now making the “lousy” assessment (and the instant motion Judge agrees with that determination, because he writes “Marshall’s statement ... is clearly based ... [not] on ... his reading of the judge’s ruling in the case,” even though it is the height of legal/ethical irresponsibility for an “ethical” lawyer like Marshall to call a case “lousy” without even reading-up on it). So

now, given that it's Marshall who made the assessment of "lousy," we need to ask about the *factual basis* upon which he made that assessment (because, if there were *no disclosed factual basis*, his assessment would be defamatory). Again, the instant motion Judge think it's "clear" that the underlying factual basis of Marshall's "lousy" assessment came from Tuvell's own writings on his own website, not from the judge's ruling. But that cannot be right (i.e., the judge is wrong), because Tuvell nowhere described his own *Tuvell v. IBM* case as "lousy," and to the contrary he proved everywhere that his case had great merit ("was not lousy"). Therefore we can/must conclude, yet again, that Marshall's "lousy" defamation has no true/accurate/factual basis. (And, this conclusion holds whether or not the Judge's "clearness" conjecture is correct.) (Incidentally, note that we have no need here to deeply parse the etymology of the word "lousy," because the only important aspect of the word is that all audience members perceived it as defamatory, as they certainly did.)

(v) In the fifth place, we observe that Marshall's statement, "the judge decided that his case was lousy," was **objectively/demonstrably/provably 100% false**. For, that judge **did not "decide Tuvell's case" at all**. Instead, that judge ***illegally fabricated/falsified the facts*** of Tuvell's case (*Tuvell v. IBM*), by crediting IBM's versions of the facts instead of Tuvell's at Summary Judgment time (a clear violation of the Rules of Procedure, amounting to criminal Obstruction of Justice), and then proceeded to **"decide' that different/falsified case."** And indeed, it is precisely this falsification-of-facts incident that forms the basis of Tuvell's (very proper/correct) Judicial Misconduct charge against that judge. This has already been explained in Tuvell's information provided in the instant case (Comp₉¶14-I; OATAnn₉19-21,e37-38), and it's obviously true;

so the fact that the instant motion Judge pretends it doesn't exist or is wrong is flatly untruthful, and frankly constitutes an act of Judicial Misconduct in itself.

(vi) In the sixth place, we come to the question of why Marshall bothered making any pronouncement at all about the *Tuvell v. IBM* case. That case had nothing to do with why Tuvell approached Marshall in the first place. Tuvell had no motive to do that, because the *Tuvell v. IBM* case has nothing to do with Marshall's field of legal ethics (instead, it's a 100% employment case which presumably Marshall knows little-to-nothing about). Instead, Tuvell approached Marshall concerning his **Judicial Misconduct case** against the *Tuvell v. IBM* judge(s), and *that* case indeed has a large component of legal ethics attached to it (because Judicial Misconduct is a subspecies of Judicial Ethics). Therefore, Marshall's 180° turn away from the only reason Tuvell contacted him, for the sole purpose of sliming Tuvell's *other* case as "lousy," amounted to a wholly gratuitous non-sequitur. And, no, lawyers don't make "innocent mistakes" like confusing/mixing-up two distinct cases like this. Therefore, Marshall's "lousy" assessment of the completely irrelevant *Tuvell v. IBM* case amounted to "**actual malice**" against Tuvell (in the technical language of defamation law, see OATAnne33,143).

16E • Misleadingly false/untruthful. As has been explained/proved over and over again (in Comp, Opp, and OATAnn, and now in this OpAnn), the various "negative language words" uttered by Marshall are complained-of — **not** because of their trivial/mere insult/ridicule/hyperbole/etc. nature — but rather because of their **contextually defamatory implicatory** nature (denoted "CTXDEFIMPL" in Opp).

The problem here is that the Judge **misstates/falsifies the law** (in exactly the same way he has done elsewhere, see Ann16A *supra*).

Namely, he's saying that "opinions based on disclosed information are not actionably defamatory." That's false. His falsity lies in **omitting the qualifier "true"(/nondefamatory)** qualifying the information being disclosed (and, also again, he's misusing the word "information," where he should be speaking of "statements of fact," see Ann14A *supra*). If the (disclosed or undisclosed) statements-of-fact which underlie opinions are **themselves defamatorily false** (as they *are* in the case-at-bar, as proven *ad nauseam* herein *passim*), then the opinions amount to **actionably defamatory repetitions** of those defamatory statements-of-fact, and hence those opinions are indeed actionable as defamation. This is what "CTXDEFIMPL" *means*.

APPENDIX

The original emails from Tuvell to Marshall (both first and second versions, Ann2A *supra*) are reproduced in this appendix *infra*, in their entirety. These are also available online at <http://judicialmisconduct.us/sites/default/files/2017-09/EthicsAlarms%2CEmails%3D2017-08-26.pdf>.

Subject: I can't figure you you
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 08/26/2017 02:09 PM
To: jamproethics@verizon.net

Jack —

I've been following your website (<https://ethicsalarms.com>) since I "discovered" it a couple of months ago. Its About page is especially lucid and luring.

The problem is, your posts don't live up to the About advertisement. Specifically, the About page speaks only about whole-life ethics (a very laudable goal, what I was looking for), but says nothing about partisan/political rants. Yet, it seems like that's what the website does, and only that. Further, everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal /democrat is bad).

Is that the way you really see things? Or am I missing something?

Thx.

— Walter Tuvell (PhD, Math, MIT & U.Chicago — i.e., "not-a-crank")

Subject: Re: I can't figure you you
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 08/26/17 16:56
To: jamproethics@verizon.net

Typo on the Subject line (sorry): It should read "I can't figure you out".

On 08/26/17 14:09, Walt Tuvell wrote:

Jack —

I've been following your website (<https://ethicsalarms.com>) since I "discovered" it a couple of months ago. Its About page is especially lucid and luring.

The problem is, your posts don't live up to the About advertisement. Specifically, the About page speaks only about whole-life ethics (a very laudable goal, what I was looking for), but says nothing about partisan/political rants. Yet, it seems like that's what the website does, and only that. Further, everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal/democrat is bad).

Is that the way you really see things? Or am I missing something?

Thx.

— Walter Tuvell (PhD, Math, MIT & U.Chicago — i.e., "not-a-crank")