Appeals Court of the Commonwealth of Massachusetts

№ 2018-P-1605

Walter Tuvell
Plaintiff/Appellant

v.

Jack Marshall
Defendant/Appellee

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

BRIEF OF PLAINTIFF/APPELLANT

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STATEMENTS OF STATUTES, RULES, ETC.

Elements Of Cause-Of-Action For Defamation

["Hornbook" (so-called by the Judge at OATAnn℘3ℓ12 AplApx℘114). Here, we cite Restatement §558, as languaged by Sack §2.1; see important discussion of these criteria at OATAnne3–5℘b–d AplApx℘150–152, including the fact that in Massachusetts the first clause of item (δ) here always obtains.]

For libel (as opposed to slander)

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

(β) An unprivileged publication to a third party.

(γ) Fault amounting at least to negligence[2] on the part of the publisher.

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

MGL Ch.231 §93: Retraction of Libel

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

[Verbatim:] Retraction of Libel; Mitigation of Damages; Punitive Damages

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1· The proper definition/meaning of the word "false" in the sense of defamation law is **Material Falsity** (℘24 *infra*). It is not the usual naïve/logical abstract/formal rigid/binary "yes/no." It's a specialized legal/real-world concept, incorporating not only the usual/strict **factual falsity,** but also/additionally ***contextually defamatory implication*** (as we've already introduced, via our abbreviation **CTXDEFIMPL,** in Opp and TblDefam). **Every single one** of the ~57 [see ƒ5 *infra* for the "~" notation] defamatory acts we've pled in Comp (and now restated in TblDefam) **is "materially false".**

2· Marshall's level of fault is generally 100% direct/intentional; but this negligence clause does come into play twice, at ℘32ƒ40 and ℘37ƒ49 *infra.*

Where the defendant in an action for libel, at any time after the publication of the libel hereinafter referred to, either before or after such action is brought, but before the answer is required to be filed therein, gives written notice to the plaintiff or to his attorney of his intention to publish a retraction of the libel, accompanied by a copy of the retraction which he intends to publish, and the retraction is published, he may prove such publication, and, if the plaintiff does not accept the offer of retraction, the defendant may prove such nonacceptance in mitigation of damages. If within a reasonable time after receiving notice in writing from the plaintiff that he claims to be libelled the defendant makes such offer and publishes a reasonable retraction, and such offer is not accepted, he may prove that the alleged libel was published in good faith and without actual malice, and, unless the proof is successfully rebutted, the plaintiff shall recover only for any actual damage sustained. In no action of slander or libel shall exemplary or punitive damages be allowed, whether because of actual malice or want of good faith or for any other reason. Proof of actual malice shall not enhance the damages recoverable for injury to the plaintiff’s reputation.

NOTATION; ABBREVIATIONS

- ✔ **Comp** = Plaintiff's Verified Complaint.
  - **DGIMF** = "Disputed Genuine Issue of Material Fact" (i.e., fiction/falsehood/lie, in the context of defamation).
  - **CTXDEFIMPL** = "Contextually Defamatory Implication." See *Material Falsity* (℘24 *infra*).
- ✔ **TblDefam** = Comp's "~57" (ƒ5 *infra*) defamations, in tabular format (mentioned at OATAnn*e*17 AplApx℘154).
- ✔ **Diss** = Defendant's Motion to Dismiss.
- ✔ **Opp** = Plaintiff's Opposition to Diss, especially ✔ **OppExhA** = Opp Exhibit A (the blog at issue).
- ✔ **OATAnn** = Oral Argument Transcription, Annotated.
- ✔ **OpAnn** = Annotated version of **Op** = Opinion.
- *✔ = The above documents are all included in AplApx.*
- **ApltBrief** = Appellant's Brief (this very document).
- **AplApx** = Appeals Appendix, accompanying ApltBrief. (Referenced routinely herein per MRAP 16(e).)
- ℘,ƒ,*e*,ℓ = Page, footnote, endnote, line.
- †,‡ = In Comp and TblDefam (and hence where those are cited herein), these dagger symbols have a specialized meaning,[3] explained at Comp¶17 AplApx℘21.
- ",",',' (quotation-marks) = Verbatim quotation or paraphrase.[4]
- ↡,↟ = Footnote continuation on next/previous page.

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

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

INTRODUCTION & ISSUES PRESENTED FOR REVIEW

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

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

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

6· Paraphrase; the literal quote is at ℘28 *infra.*

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

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

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

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

IV· The United States Supreme Court itself has univer-

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

ARGUMENT

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

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

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

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

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

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

Namely, the Judge here has gone beyond his charter, by going so far as to *ignore* Plaintiff's original Comp, and instead himself substitute/parse/evaluate/weigh OppExhA, usurping the jury's function/prerogative, to ferret-out/cherry-pick with a jaundiced eye only those portions of OppExhA which allowed him to reach his false conclusion —— paraphrased as "everything Marshall said/ wrote was 'pure fact-free/true-fact-based opinion,' hence non-actionable" (complete non-paraphrased version quoted at ℘28 *infra*).

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

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

Our biggest single gripe (arising over and over) concerns **undisclosed and/or false defamatory facts (lies)**: The Judge decided (wrongly), as a global/generalized whitewash/handwave (℘30 *infra*), that all of Marshall's complained-of statements were "opinions based upon disclosed true facts" (which renders them non-actionable). The problem is, that's just plain flatly false, upon any fair (i.e., unbiased) reading of Comp+OppExhA+OATAnn+TblDefam.

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

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

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

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

to state a claim." **He/they failed to do so, miserably** (he/they just vaguely broad-brush whitewashed instead).

The Judge's rationale/"explanation" for dismissal —— quoted at ℘28 *infra* (and which is exhaustively analyzed/critiqued/thwarted in Plaintiff's annotations at OpAnn℘f–v AplApx℘205–221) —— amounts to a global whitewash, in the sense that it doesn't really explain anything. In other words, he just made-up the preordained answer he wanted ("all pure opinion"), and from that point on ignored ("didn't hear") the Plaintiff's actual story. (This "global whitewash" aspect is addressed *infra* in the section on V· Judges Must Provide Clear Non-Conclusory Reasoning For Their Opinions (With Examples/⋆Proofs⋆)). Judges cannot (must not be permitted to) do that.

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

The Judge's main reason for dismissal (the whitewash, see ℘30 *infra*) mainly supports the idea that Marshall's defamations are covered under "the 'opinion' exception." We address that now (notwithstanding that "opinion" is not even the right/modern standard to be using, a topic addressed *infra* in the section on IV· Why Doesn't Massachusetts Honor The Supreme Court's MATERIAL FALSITY Touchstone?).

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

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

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

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

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

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

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

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

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

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

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

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

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

18· For which, see e.g. *Gutterman.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁋23 ble but much more deeply searching flexible objectivity/verifiability-based approach.

25· Via *Air Wisconsin v. Hoeper,* which is linked to the lead case, *Milkovich,* via the intermediary of *Masson,* the latter likening "materiality" to "substance/gist/sting," and also stating that "materiality is the sort of mixed question of law and fact that has typically been resolved by juries" (internal quote-marks omitted). "Material falsity" isn't an "all-brand-spanking-new-fangled thing." It's just a compatible/incremental refinement/improvement on methodology/worldview/*weltanschauung* —— an explication/repackaging of the *Restatement's* first element (⁋4α *supra,* especially the word **false** occurring there), highlighting the *(already-incorporated) factor of contextual implication* (what we call CTXDEFIMPL, ⁋6 *supra*). Anent, we hereby now *import* the discussion at OATAnne18⁋f–i AplApx⁋154–157.

26· The take-away here being the **shift of focus/emphasis, away from** the utterer/author, **towards** the utterance/communication itself, and its (potential) effect on the audience. That is, **away from** the defamer's transmission/intention (which can be, and typically is, amorphously/cynically "faked" *ex post facto*), **towards** the audience's reception/interpretation (which is much more tractable). In the instant case, some audience members *did actually* interpret Marshall's lies as fact-statements (as any casual perusal of OppExhA AplApx⁋77–111 easily **proves:** e.g., ⋆ƒ53 *infra*⋆).

27· (i) **"Context Matters"** (*BNSF v. White* ⁋69). In a defamation case, context includes signs/signals of the speaker's nuanced meaning (as to "binary"/bald opinion vs. assertion of fact), which may or may not be sufficient to put the audience on reasonable/adequate notice. (ii) At Motion-to-Dismiss time, **the judge must award all arguably reasonably (see ⋆ƒ53 *infra*⋆) "close-calls" to nonmovant**: "Whether a statement is a factual assertion or an opinion is a question of law *[only]* if the statement **unambiguously** constitutes either fact or opinion[;] and [otherwise] a ⁋25

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

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

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

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

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℘24 question of fact [for the jury] if [the statement is ambiguous, i.e.,] the statement reasonably can be understood **both ways**" (*Scholz* ℘250, emphasis added, citations and internal quote-marks omitted).

28· In the case-at-bar, this characteristic of "(reasonable) potentiality" need not be belabored, because any casual perusal of the evidence itself (the blog stream, OppExhA AplApx℘77–111) reveals that Marshall's invective directly did indeed generate the *actuality* (hence *a fortiori potentiality*) of much false reputational damage against Tuvell, in the reactions/responses of the audience members (e.g., ⋆ƒ53 *infra*⋆).

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

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

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

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

“THEN A MIRACLE OCCURS …”

The very famous/popular science/math/ logic cartoon presented in Exhibit A ℘49 infra (q.v.), which is wholly relevant to our Argument, is intended to appear inline at this place.

“I think you should be more explicit here in step two.”

“Conclusioriness”[30] —— a.k.a. “silent/unsupported handwaving,[31]” jumping to conclusions without adequate foundation/explanation/details, “skipping the intermediate logic,” etc. —— is anathema (a “joke”) to rational

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

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

human beings of all stripes, to scientific/intellectual endeavor generally, and here to the law especially. ⋆**Proof**⋆ is the lifeblood of the law (just as it is for mathematics, Plaintiff's specialty). Otherwise, mindfulness remains muddled in the mire of metaphysics. "The Truth (or God, or Devil) Is In The Details."[32]

In the case-at-bar, the nub of the Judge's writing cannot be taken seriously by anyone serious. His reasoning can be boiled down to nothing more than trivial/superficial (and false) broad-brush silence/mumbling/hand-waving ("then a miracle occurs …," ℘27 *supra* and Exhibit A ℘49 *infra*), without providing any secure/sincere analysis.

To ⋆**prove**⋆ this, we quote next the *full extent*[33] of the pseudo-"reasoning" upon which the Judge's wrongful decision relies, wherein we highlight/comment upon the Judge's **two core lapses/falsehoods:**[34]

> As for Marshall's Comments, those statements likewise cannot serve as a basis for Tu-

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

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

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

vell's defamation claim because they **can only be reasonably understood as expressions of opinion rather than fact. [BUT THIS IS PATENTLY FALSE: It *silently ignores* Marshall's ~29 explicitly indicated false/lie defamatory fact-statements; see also ƒ27 *supra* regarding "close calls" (though nothing in the instant case is very "close").] [Therefore the remainder of what the Judge has to say on this point is a nullity:]** Given the language Marshall employed and the medium in which Marshall's statements were made —— a personal blog where Marshall shares his views on ethics, politics and other matters, his remarks about Tuvell's email, comments, Judicial Misconduct USA website, and lawsuit against IBM plainly expressed his opinions. …[35]

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

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

> site, which discusses his lawsuit against IBM. Marshall's readers, therefore, **were fully aware**[36] of the basis for Marshall's opinions on these topics and were able to assess whether Marshall's opinions were warranted. …[37]
>
> Accordingly, because the statements are nonactionable opinion, Tuvell cannot prevail on his defamation claim in so far as it is based on Marshall's Comments.

The Judge's silence/falsity here is what we call his **Global/Generalized Broad-Brush Whitewash/Handwave**. It is conclusory/false/unacceptable.[38]

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

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

37· The Op's citation to *Scholz* here is no more *apropos* than discussed in ƒ35 *supra.* Regarding Op's insipid footnote at Op℘16ƒ9 AplApx℘198 here, see the paragraph on the Judge's false portrayal of Marshall's insults at ℘40 *infra.*

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

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

- Blind animus towards (falsely) perceived "academic/liberal/Democrat." (This and the next item are the **most likely scenarios.**)
- "Lib-trolling," just for "fun" or "the hell of it." This is similar to the preceding item, except that Marshall didn't actually/actively/truly believe in Tuvell's "academicism/liberalism," but just pretended/lied to.[39]
- Desire to support/defend/cover-up judges guilty of Judicial Misconduct, because that helps generate more wealth for unscrupulous/unethical lawyers (such

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39· This explanation might seem unthinkable to sane people, but it's an entirely plausible theory in Marshall's case. See *Marcotte* (Exhibit B ℘50 *infra* —— which we exhibit here because it employs language Marshall understands: it uses the label "conservatives" in the same way as Marshall's crazed use of the label "liberals" at OppExhA℘1–2 AplApx℘78–79). *Even if* Tuvell *were* some kind of "raging flaming liberal" (he isn't, of course, instead he's steadfastly "non-label-affiliated," including non-affiliation with the "No Labels movement"), Marshall's lies/defamation would *still* be illegal/actionable, **no matter what he "thinks/opines"** —— because he **lies factually defamatorily,** and *lying trumps opinionation,* per the Milkovich Test (℘19 *supra*).

as Marshall).

- Simple/innocent/non-malicious error/misperception/misunderstanding. This possibility isn't as feasible as the preceding possibilities, because Marshall has refused/waived to make/correct this claim, *twice:* (i) Tuvell's demand letter (℘10 *supra*); (ii) response-to-Complaint (MGL Ch.231 §93, ℘4 *supra*).
- Too ignorant/stupid to understand what Judicial Misconduct (properly so-called) is even about.[40]

The Judge must not be permitted to commit such whitewash. Instead, what the Judge/Court is bound to do is sincerely/diligently *analyze and explain/*⋆***prove***⋆ —— in clear/convincing terms —— exactly w*hy each/every*[41] claim of defamation in Plaintiff's Complaint (all ~57 of them, no cherry-picking) is "mere pure fact-free opinion." He does not do that. (And he cannot.)

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

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

41· See, e.g., ƒ12,38 *supra.*

isfactory conclusion/opinion is to stoically march through each/every[42] row of TblDefam, supplying *detailed reasons* why (or why not) the defamations named there fail (or succeed) in meeting the criteria of DGIMF and/or CTXDEFIMPL. Summary/breezy(/false) handwaving doesn't cut it. Plaintiff has studied these defamations from every angle he can conceive, and fails to understand *why* any of them are dismissable. (And indeed, they *are not.*)

The remainder of this section now presents *four very explicit counter-examples, with rock-solid* ⋆***proofs***⋆, to the Judge's falsified "opinion-only" ruling.[43]

The "Linking" Defamation

To *illustrate* the kind of analysis a thoughtful/principled Judge/Court must undertake, let's consider the **simplest example** (out of ~57), namely Marshall's **linking defamation**[44] (item †14Cd in Comp/TblDefam): "… initially with a link in a comment to another commenter, causing me

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42· See, e.g., ƒ12,38 *supra.*

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

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

to miss it …"[45] The Judge below has (silently) "decided" (as part of his global whitewash) this statement is an "opinion." But it is not: it is *obviously* a statement of fact,[46] and it's defamatory (it "caused Marshall to miss it [in some nefarious way, by context]," according to Marshall himself). Furthermore, it is *trivially* ***⋆provably⋆ objectively*** *false:* for otherwise, the alleged link would have to appear in one of Plaintiff's 10 posts/comments (in OppExhA).[47]

Where, pray tell, did it appear?

Nowhere (as any casual perusal of those 10 **objectively ⋆proves⋆**). It doesn't exist. It didn't happen. It's a completely false fabrication. Marshall made it up. He lied. Period. (Over and over and over again, *passim*).[48]

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

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

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

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

The "Precise Issue" And "Sandbagging" Defamations

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

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

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

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

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

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

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

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

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

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

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

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

beginning of his interactions on the blog (*after* the initial misconception had been clean-slated). No "sandbagging" involved, in any way/shape/form. Obviously. Factually. Period.[49]

The "Theft Of Professional Services" Defamation

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

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

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

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

terms,[50] because all of the "valuable" services Marshall offers/provides on his blogsite (Ethics Alarms, where all interactions took place) are are not costly/paid —— they are <u>FREE OF CHARGE, TO ALL-COMERS, ALL THE TIME!</u> There-fore Marshall's bogus charge is either:

- a straight-out factually false (defamatory) lie; or
- it *depends upon* (hence *implies*) some undisclosed false fact (lie).[51]

And keep this in mind, too, as you study this inci-dent:[52] Some audience-members who witnessed this incident *did actually* **believe-as-fact** Marshall's defamatory lies, according to their own report —— as ⋆**proved**⋆ by (e.g., *e pluribus unum*) the comment "Good lord" at OppExhA℘17 AplApx℘94, to which Marshall responds "My thoughts ex-actly" —— which also ⋆**proves**⋆ his **intent** to induce false-hoods into the minds of his audience, and that inducement

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

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

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

succeeded just as he intended/anticipated/hoped-for.[53]

VI· Judges Must Not Publish Prejudicial False Statements About Litigants

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

These two aspects are:

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

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

aware of his own falsity.

The Judge Falsely Portrayed Marshall's "Insults." In his insipid Op℘16ƒ9 AplApx℘198 (with a surfeit of inane citations), the Judge falsely writes about the "insults" Marshall hurled at Tuvell, wasting time explaining why such communications are not actionable. That was falsely prejudicial against Plaintiff, because Plaintiff **has never claimed any "insult," however defamatory, to be actionable.**[54] Indeed, Plaintiff explicitly so stated, in both Opp℘13ƒ18 AplApx℘69, and at oral argument OATAnn℘21ℓ16–20,℘22ℓ5,℘28ℓ18,℘30ℓ2,℘k,℘sAnn59,℘ahAnn147 AplApx℘132,133,139,141,159,167,182 (so the Judge was more-than-fully aware of his own falsity). For more information about this point (though what "more" could possibly be needed?), see OpAnn℘u–vAnn16E AplApx℘220–221.

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

SUMMARY & CONCLUSIONS; CONJECTURES; *FINIS*

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

[IV: "Opinion" vs. "Material Falsity"] He misanalyzed the case (wrong standard of review), by focusing/fixating/obsessing/harping on old-style rote shallow/narrow out-of-context **opinion.** The "opinion privilege" he applied simply doesn't even exist any more (if it ever did), thanks to *Milkovich* and progeny.[55] He should have conducted a new-style thoughtful deep/wide contextual/implicatory analysis of **Material Falsity** instead, via the ***Milkovich* Test**. Doing so would've given him a better chance of arriving at the right decision.

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

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

shall's opinions were all based on **undisclosed and/or false defamatory fact-statements (lies)** (else, **where *exactly*, pray tell, are the disclosed/true facts** underlying the linking and theft defamations, ℘33,37 *supra,* and indeed each/every all the others in TblDefam⁇ —— **THEY DO NOT EXIST!!**). And conversely: *even if* the Judge had been "right" about his opinion-interpreted decision (which he wasn't), it would still conflict with the *Milkovich*/Material-interpreted decision (preceding paragraph I *supra*), so he would still be wrong.[56]

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

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

57· See ƒ58 *infra.* Note, also, that **Marshall himself admitted to committing at least three lies** (OATAnn℘7ℓ8 AplApx℘118) (itself a gross lie, since the actual count ↕℘43

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

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

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

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

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↕℘42 is ~29, see TblDefam), but the Judge just swept that inconvenient fact under the rug.

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

[Judge Conjecture] Our best inference about the lower Judge's ignoble bias[58] against the instant Plaintiff has nothing to do with the case now before this Appeals Panel, nor *ad hominem* against Tuvell. Instead, it has to do with the Plaintiff's other case, *Tuvell v. IBM* (and his Judicial Misconduct charge against the judge in that case), and particularly his website, http://JudicialMisconduct.US. Namely, we believe the Judge was acting upon a misguided/wrongful desire to "protect the *faux* sanctimoniousness of the robe" (such as his own), by pretending the whole concept of Judicial Misconduct/crime

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

"doesn't exist." It does exist.[59] **That was <u>COVER-UP</u>.**

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

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

The Internet is not a *carte blanche* Get-Out-Of-Jail-Free card for defamation. Observable/objective reality is what rules. And in this case, **observable/objective reality resides visibly in Tuvell's 10 blog posts**[60] (in OppExhA), not in Marshall's *ex post facto* cynical gaslighting.[61]

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

60· Each/every one, which very effectively demolish all of Marshall's ~57 incidents of defamation —— **each/every one, individually,** <u>*as the law unequivocally requires/demands*</u>. ƒ12,38,41,42 *supra.* Those 10 posts tell the story clearly/plainly, in **"black-and-white" *(literally):*** no leeway for "judicial interpretation" is required/warranted/permitted —— **interpretation is reserved for the jury,** <u>*as the law unequivocally requires/demands*</u>. ƒ27(ii) *supra.*

61· Recalling that the real reasons for Marshall's lies (as opposed to his *ex post facto* pretended "opinionation") are most likely the scenarios listed at ℘31 *supra.*

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

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

SIGNATURE & VERIFICATION; CERTIFICATES

SIGNATURE & VERIFICATION

Respectfully submitted, and hereby signed, under the pains and penalties of perjury. (This signature/verification and date also apply to the CERTIFICATES ℘48 *infra.*)

Walter Tuvell, *Pro Se*
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Dec 17 2018

CERTIFICATES

CERTIFICATE OF COMPLIANCE

Pursuant to MRAP 16(k), I hereby certify that this brief is in substantial compliance with all material aspects of the pertinent Rules of Court, to the best of my good-faith ability to understand/implement them. (See also ℘47 *supra.*)

This very page illustrates compliance with the salient type-density requirements of MRAP 20(a)(1–3). See the bottom of this page for a maximum-length line of 57 characters (noting that $5\frac{1}{2}$ inches/line × $10\frac{1}{2}$ chars/inch = $57\frac{3}{4}$ chars/line).

WETwoll

CERTIFICATE OF SERVICE

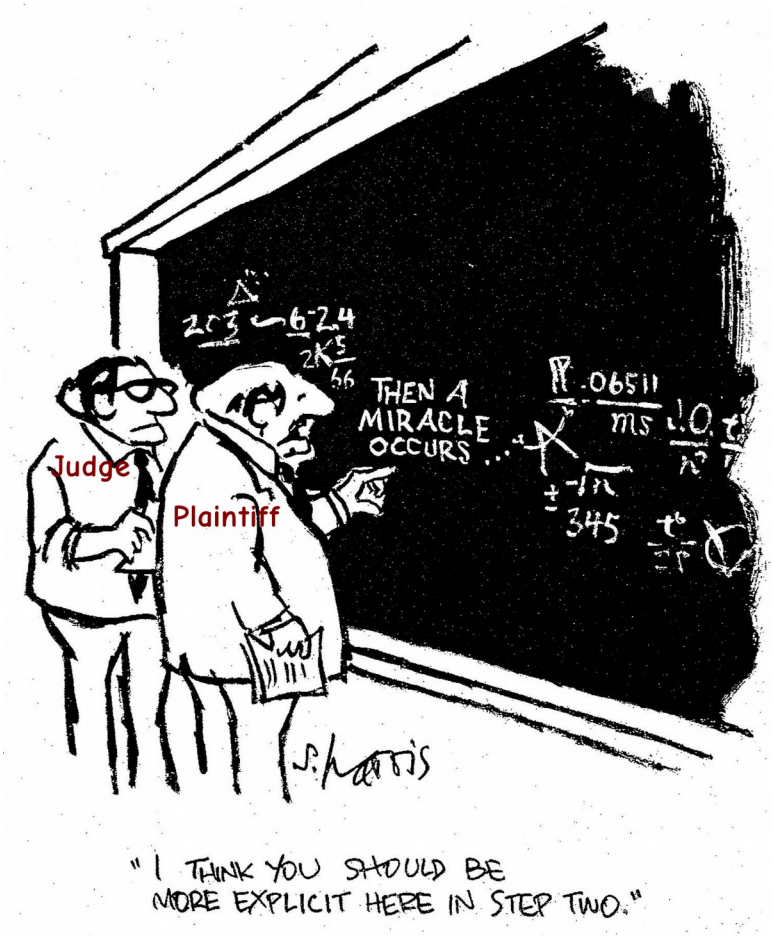
Pursuant to MRAP 13(d), I hereby certify that I have served notification of and access to this document upon Defendant, via email and first-class U.S. Mail. (See also ℘47 *supra.*)

WETwoll

␣AaBbCcDdEeFfGgHhIiJjKkLlMmNnOoPpQqRrSsTtUuVvWwXxYyZz␣

EXHIBIT A: "THEN A MIRACLE OCCURS …"

The famous/popular cartoon below (© Sidney Harris, http://ScienceCartoonsPlus.com), wholly relevant to our Argument, is intended to be included inline at ℘27 *supra.* Unfortunately, it must be relocated out-of-line here, because the court clerks have ruled that "[s]uch an image is not permitted to be included in the argument section of the brief by the Rules of Appellate Procedure."[62]



62· Though, Plaintiff can find no such applicable rule. Other jurisdictions have no trouble permitting images.

EXHIBIT B: *MARCOTTE* ARTICLE

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

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

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

AMANDA MARCOTTE

NOVEMBER 12, 2018 8:35PM (UTC)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AMANDA MARCOTTE

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

ADDENDUM A: OPINION BELOW

The (verbatim) version of the **Opinion (Op)** included in this Addendum is only a formality (required by rules of court): but it is redundant, and should be ignored. Preferentially, instead, the reader is referred to the accompanying ~~Appellate~~ Appeals Appendix (AplApx℘183–224), because it presents an appropriately **Annotated version of the Opinion (OpAnn)**.

11

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

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**.

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." *Fairneny* 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. Facts[1]

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:

> 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:

> **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://JudicialMiscoduct.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:

> **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 you 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).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:

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:

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:

> **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 here[2]
>
> 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

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[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.

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.

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[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