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)

APPELLANT'S MOTION FOR RECONSIDERATION OR MODIFICATION OF DECISION

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INTRODUCTION

This Motion is filed pursuant to MRAP (Mar 1 2019) §27(a): we contend that "the court has overlooked or mis-apprehended" certain "points of law or fact;" these are "stated with particularity" herein. We seek correction.

CONVENTIONS

We continue to support *all* our preceding filings in this case.[1] Hence we hereby reiterate/incorporate them by reference.

We also continue to support all conventions established in our preceding filings, such as the Tables of Authorities and Notations/Abbreviations, to which we now add:

- **AplOp** = Appellate Opinion (styled "Memorandum and Order Pursuant to Rule 1:28"), dated Oct 31 2019.
- **MotReconMod** = This very Motion for Reconsideration/ Modification.

Our four Arguments (I–IV, ARGUMENTS section *infra*) are *roughly related/cumulative,* in this manner:

I ➡ II ➡ III ➡ IV ("➡" means "implies")

1· This even in the face of the Panel's complaint about "difficulty to understand" (AplOp℘1f2), with which we respectfully disagree, after additional review. In that same footnote, the Panel also complains about non-conformance with MRAP §16, but we don't know what that means (so we can't correct it), absent further clarification, because the Court Clerks do verify compliance of all our filings.

ARGUMENT[2]

I. The Panel Explicitly Contradicts *Milkovich*

The principal holding of *Milkovich* is that **"there exists no such thing as 'opinion privilege' (especially, no 'privileged forum/milieu') in the law of defamation"** (paraphrase).[3] The Panel holds explicitly oppositely.

To prove this contention by direct illustration/quotation, we consider the following two verbatim excerpts:[4]

On balance … a reader would not expect a sports writer on the **sports page** to be particularly knowledgeable about procedural due process and perjury. It is **our belief** that "legal conclusions" in such a context would probably be construed as the writer's **opinion.**	We place **[explicit] particular emphasis** on the fact that the statements here were made in a **blog,** the format and substance of which "implied **commentary** rather than the statement of objective facts." [Citing to *Disend et al.,* but futilely, see ℘5ƒ6 *infra.*]

As seen here, these two passages **explicitly agree** (wrongly): they're ***identical*** *(mutatis mutandis)* in their essential relevant sense. They both (wrongly) uphold a (non-existent) "opinion privilege," based upon an over-

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2· This MotReconMod only addresses the **most important** of our objections to AplOp (though as noted at ℘3 *supra* we continue to support *everything* in our previous filings: we perceive no faults on additional review).

3· ApltBrief℘23ƒ23, e.g., but also *passim.*

4· Emphasis added. The left passage, as quoted at *Milkovich*ƒ4, is from the *Milkovich* inferior court's **(overturned)** decision. The right passage is from our AplOp℘7.

riding trait of the defamation cases before them: residence in a (non-existent) **"privileged 'broad context'"**[5] defined by the **"forum/milieu"** (sports page or web blogsite) in which the defamations occurred.

BUT: The Supreme Court shot down that contention!

For, to repeat the *Milkovich* rule: No special privilege may be accorded to "opinionation-orientation" (esp. "broad context" of forum/milieu in which defamatory utterances are published). We've already argued this extensively, agreeing with *Milkovich,* at our ApltRply℘13–17.

This suffices to prove —— "with particularity"[6] ——

5· This language, "broad context," is how the inferior court (wrongly) justified its decision (see *Milkovich*℘9); which is why we adopt that language at ApltRply℘13–14.

6· Here we may offer even more particularized detail, regarding AplOp's **futile citations:** In support of its opposition (to *Milkovich*), AplOp℘7–8 cites to ("broad contextualism" *dicta* contained in) *Disend* (which correctly overturned its lower court, in agreement with *Milkovich* but not needing to cite it), together with *Myers, Pritsker,* and *Aldoupolis.* But that is a **perplexingly *inapropos*** set of citations, because **they are all now invalid ("not good law")!** Namely, AplOp's cited passage of *Disend* (which *Disend* rejects) reads: "As an alternate barrier to maintenance of Disend's action, the school argues that the headmaster's letter is no more than an expression of opinion, hence incapable of interpretation in a defamatory sense. [Here *Disend* cites to (but rejects) *Myers*, *Pritsker*, *Aldoupolis,* and Restatement of Torts —— **all of them *pre-Milkovich* (1990), and *invalidated* by *Milkovich.***] In those cases the ['broad context'] medium in which the speech or writing occurred —— respectively a magazine, a radio talk show, and a newspaper 'op-ed' piece —— and the subjects considered, implied commentary rather than the statement of objective facts." In sum: AplOp's citations to *Disend et al.* were **long ago scotched by *Milkovich,* hence are now invalid/futile.**

that the Panel **explicitly** "overlooked or misapprehended points of law" with respect to *Milkovich* (even though it paid lip service to *Milkovich* by citing it approvingly).

That is error. It needs to be corrected.

II. The Panel Explicitly Contradicts *Schaer* And *Scholz*

As with *Milkovich,* the Panel paid lip service to *Schaer* and *Scholz* by citing them approvingly. Nevertheless, the Panel holds explicitly oppositely from them.[7]

To prove this contention by direct illustration/quotation, we consider the following verbatim excerpts:[8]

We therefore review **each** factual allegation …	A point that Tuvell, whose argument on appeal includes criticism of the motion judge's **failure to address individually each of the statements** he considers to be defamatory, overlooks.[9]
The moving party bears the burden of demonstrating the absence of a triable issue of fact on **every** relevant issue.	

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7 · Actually, this "*Schaer/Scholz* opposition" is not independent of the preceding "*Milkovich* opposition," but inextricably depends upon it: by rejecting *Milkovich,* the Panel "just assumed" (wrongly) it can/does blindly/conclusorily sweep everything *en masse* under the (non-existent) "opinion privilege" rug, thereby ignoring the case's detailed facts (each/every, individual, one-by-one). "I ➡ II" (℘3 *supra*).

8 · Emphasis added. The left passages are from *Schaer*℘478 and *Scholz*℘249 (both already quoted at ApltBrief℘16ƒ12). The right passage is from AplOp℘5ƒ5.

9 · AplOp attaches this excerpted passage, without citation, to its out-of-the-blue assertion (which everyone agrees with): "An allegedly defamatory statement must be assessed in context, and not as isolated words or phrases." Which is *inapropos,* because that (agreed) assertion is ▻℘7

As seen here, these passages **explicitly disagree** (wrongly): *Schaer* and *Scholz* (*and all others,* at least post-*Milkovich*) hold that **"each and every"** contested statement in a defamation case **must** be examined **individually, one-by-one** (for failure to state a claim, at motion-to-dismiss time). Our Panel opposes that (wrongly).

This suffices (in light of ƒ7 *supra*) to prove —— "with particularity" —— that the Panel **explicitly** "overlooked or misapprehended points of law" with respect to *Schaer* and *Scholz.*

That is error. It needs to be corrected.

III. The Panel Wrongly Characterizes Marshall's Statements As "Opinion"

The Panel upholds the following verbatim excerpt:[10]

> [T]he majority of the statements cited as defamatory in Tuvell's complaint can **only reasonably be understood** as expressions of Marshall's **opinion** which, regardless of their tone,[11] are not actionable.

◅℘6 *not* what Tuvell's "criticism" (it's at AplBrief℘45ƒ60 *et passim*) as cited by the excerpted passage, is about. Clearly to the contrary, far from "overlooking" the concept of "context," Tuvell properly invoked it dozens of times.

10 · AplOp℘6, emphasis added.

11 · Regarding the "tone" attribute, AplOp goes on to quote several "instances of pure hyperbole." Everyone agrees such "pure" statements are inactionable —— **provided that they really are indeed "truly 'pure' (that is, 'without more')"** —— and Appellant has so stipulated multiple times (see e.g. AplBrief℘40). However, when such statements are uttered in a **"with more"** context which **implies factually false defamatory information,** it becomes ***Milkovich* Material Falsity,** so **actionability does attach** —— and that's precisely/only ▻℘8

This passage is erroneous. The reason is that it inextricably depends upon the erroneous "*Schaer/Scholz* opposition" —— which in turn (per ƒ7) inextricably depends upon the erroneous "*Milkovich* opposition" —— both *supra.* "II ➡ III" (℘3 *supra*).

Namely (with particularity): The Panel denies/opposes *Schaer/Scholz,* such that it blindly/conclusorily sweeps everything *en masse* under the (non-existent) "opinion privilege" rug (ƒ7 *supra*). But per *Schaer/Scholz* (and *Milkovich*), it is **<u>un</u>reasonable to "understand"** *any* defamatory statement, **each/every one individually, <u>unless</u> it is scrutinized by solicitous and thorough evaluation, conscientiously undertaken.**[12] The Panel's holding opposes this teaching. Hence the Panel is wrong.

This suffices to prove —— "with particularity" —— that the Panel "overlooked or misapprehended points of fact" with respect to this case.

That is error. It needs to be corrected.

IV. The Panel Wrongly Characterizes Marshall's Statements As Non-Defamatory

The Panel upholds the following verbatim excerpts:[13]

◅℘7 what Appellant has ever claimed/argued (see e.g. ApltBrief℘40ƒ54).

12· This very strong language comes directly from *Milkovich* and *Schaer/Scholz* (see ApltRply℘15).

13· Emphasis added. AplOp℘7,8.

… Marshall's **statements** that Tuvell misrepresented to him the **true reason for his interest** in Marshall and his blog, and his statement that Tuvell's contact was a means of **seeking free legal advice** about his failed lawsuit … [are] … not likely to "discredit[] the plaintiff in the minds of any considerable and respectable class of the community."
We do not see that Marshall's **speculation** about **Tuvell's motives** would "tend to hold the plaintiff up to scorn, hatred, ridicule, or contempt, in the minds of any considerable and respectable segment of the community.

These passages are erroneous, for two reasons each.

One reason involves the determination about "lack of **potential discreditation** of Tuvell in the minds of any considerable and respectable segment of the community" (paraphrasing, both passages). But that question of potential discreditation is not a matter for **speculation by the Panel,** as it has done. Instead, it's a matter of **plain observational fact.** Namely, a "solicitous/thorough/conscientious scrutiny/evaluation" (per *Milkovich, supra*)[14] of the actual blog contents reveals immediately that a "considerable/respectable segment" of the "community" of blog participants/commenters **did indeed actually discredit** Tuvell with "scorn/hatred/ridicule/contempt." But the Panel ignored that plain observation. Hence the Panel was wrong.

The other reason involves the determination about **Marshall's speculative statements** involving Tuvell's

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14 · This supports "III ➡ IV" (℘3 *supra*).

"'misrepresentations' as being the cause for potential discreditation" (paraphrasing, both passages). But that question is not a matter of Marshall's "speculative" statements. Instead, it's a matter of Marshall's plainly "factually false" statements. Namely, a "solicitous/thorough/conscientious scrutiny/evaluation" (per *Milkovich, supra*)[15] of the actual blog contents (specifically Marshall's so-called "linking/sandbagging" defamation) reveals immediately the **objective/unambiguous/provable factual falsity (*not* "speculation")** of Marshall's operative "linking/sandbagging" statement at issue —— which is:

> … initially with a link in a comment to another commenter, causing [i.e., "sandbagging"] me to miss it …

This defamation is **objectively/unambiguously/provably factually false,** twice:[16] (i) because no such **"link"** as contemplated/described here actually existed in any objective reality; (ii) because Tuvell had indeed **"initially"** explicitly stated up-front (in his very first post to Marshall's blog, to which Marshall in fact responded nicely) his motives for contacting Marshall.

The Panel's holding opposes the above provably true renditions. Hence the Panel is wrong.

This suffices to prove —— "with particularity" ——

15· This supports "III ➡ IV" (℘3 *supra*).

16· This is not in dispute. It is exhaustively analyzed at ApltBrief℘33–37 and ApltRply℘9–11.

that the Panel "overlooked or misapprehended points of fact" with respect to this case.[17]

That is error. It needs to be corrected.

CONCLUSION

For all the reasons argued herein, we pray this Appeals Court to correct the Panel's errors.[18]

Alternatively: To the extent this Appeals Court **"prefers Massachusetts authority over the U.S. Supreme Court"** (esp., *Disend/Myers/Pritsker/Aldoupolis/etc. vs. Milkovich*), we pray the Appeals Court to **refer this case to the Mass. SJC** for definitive resolution.

17· We note one additional "overlooked or misapprehended point of fact," in passing (which we need not elaborate here, because it's covered under the effects of ƒ2 *supra* and ƒ18 *infra*). Namely, AplOp℘7ƒ8 states: "Marshall provided the link … to allow the blog's readers to see Tuvell's blog for themselves, allowing them to make their own assessment …" Three observations: (i) Marshall didn't "provide the link," only Tuvell did. (ii) Tuvell's website is not a "blog," it's a documentary site. (iii) At ℘344 of *Myers* (which case the Panel cites with approval, hence agrees with) is written (with that court's approval, emphasis added): "[T]he format of the article **encourages disjointed reading,**" which therefore **cuts against the grain of "broad context" arguments** (and this portion of *Myers* is *not invalidated* by *Milkovich*). The point to be made here is **the Internet is obviously the *ne plus ultra* of media that "encourage disjointed reading."** Hence this is "a point of fact the Panel has overlooked or misapprehended." For exhaustive argumentation of this general point ("Myth of 'Forum Duty to Investigate'"), see ApltRply℘18–25.

18· Noting again (ƒ2 *supra*) that the errors specifically argued herein are the only *most important* ones we perceive. Addressing them will have a snowball effect on *all* the issues/arguments given in ApltBrief and ApltRply.

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 ℘13 *infra.*)

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Nov 4 2019

CERTIFICATES

CERTIFICATE OF COMPLIANCE

Pursuant to MRAP 16(k),20(a),27(b) I hereby certify this document is in substantive compliance with all material aspects of the pertinent Rules of Court to the best of my good-faith ability to understand/implement them, such as: Linux; Fedora; LibreOffice; 8½″×11″; DejaVu Sans Mono 11.8; 27 lines/page; maximum line-length 57 characters (see bottom of this page, noting that 5½ inches/line × 10½ chars/inch = 57¾ chars/line); 8 pages (℘4–11). (See also ℘12 *supra.*)

WETuoll

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: Jack Marshall; 2707 Westminster Place; Alexandria, VA; 22305; jamproethics@verizon.net; http://JudicialMisconduct.US/sites/default/files/2019-11/MotReconMod.pdf. (See also ℘12 *supra.*)

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