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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NICHOLAS SANDMANN, *Plaintiff-Appellant*, *v*. NEW YORK TIMES COMPANY (22-5734); CBS NEWS, INCORPORATED, VIACOMCBS, INCORPORATED, and CBS INTERACTIVE, INCORPORATED (22-5735); ABC NEWS, INC., ABC NEWS INTERACTIVE, INCORPORATED, and WALT DISNEY COMPANY (22-5736); ROLLING STONE, LLC and PENSKE MEDIA CORPORATION (22-5737); GANNETT COMPANY, INC. and GANNETT SATELLITE INFORMATION NETWORK, LLC (22-5738), *Defendants-Appellees*.	Nos. 22-5734/5735/5736/5737/5738

Appeal from the United States District Court
for the Eastern District of Kentucky at Covington.
No. 2:20-cv-00023—
William O. Bertelsman, District Judge

Argued: April 26, 2023

Decided and Filed: August 16, 2023

Before: GRIFFIN, STRANCH,
and DAVIS, Circuit Judges.

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COUNSEL

ARGUED: Todd V. McMurtry, HEMMER DEFRANK WESSELS, Ft. Mitchell, Kentucky, for Appellant. Nathan Siegel, DAVIS WRIGHT TREMAINE LLP, Washington, D.C., for Appellees. **ON BRIEF:** Todd V. McMurtry, Jeffrey A. Standen, J. Will Huber, HEMMER DEFRANK WESSELS, Ft. Mitchell, Kentucky, for Appellant. Nathan Siegel, Meenakshi Krishnan, DAVIS WRIGHT TREMAINE LLP, Washington, D.C., Robert B. Craig, TAFT STETTINIUS & HOLLISTER LLP, Covington, Kentucky, Dana R. Green, THE NEW YORK TIMES COMPANY, New York, New York, Darren W. Ford, GRAYDON HEAD & RITCHEY LLP, Ft. Mitchell, Kentucky, John C. Greiner, GRAYDON HEAD & RITCHEY LLP, Cincinnati, Ohio, Natalie J. Spears, Gregory R. Naron, DENTONS US LLP, Chicago, Illinois, Jessica Laurin Meek, DENTONS BINGHAM GREENEBAUM LLP, Indianapolis, Indiana, Kevin T. Shook, FROST BROWN TODD LLC, Columbus, Ohio, Ryan W. Goellner, FROST BROWN TODD LLC, Cincinnati, Ohio, Jason P. Renzelmann, FROST BROWN TODD LLC, Louisville, Kentucky, Michael P. Abate, William R. Adams, KAPLAN JOHNSON ABATE & BIRD LLP, Louisville, Kentucky, Michael J. Grygiel, Cynthia E. Neidl, Candra M. Connelly, GREENBERG TRAURIG, LLP, Albany, New York, for Appellees.

STRANCH, J., delivered the opinion of the court in which DAVIS, J., joined. GRIFFIN, J. (pp. 20-38), delivered a separate dissenting opinion.

OPINION

JANE B. STRANCH, Circuit Judge. On January 18, 2019, then-sixteen-year-old Nicholas Sandmann and his classmates had an interaction with a Native American man named Nathan Phillips by the Lincoln Memorial in Washington, D.C. Video of the incident went viral, and national news organizations, including the five Defendants (Appellees, or News Organizations) published stories about the day's events and the ensuing public reaction. Sandmann sued, alleging that the Appellees' reporting, which included statements from Phillips about the encounter, was defamatory. The district court granted the News Organizations' joint motion for summary judgment, finding that the challenged statements were opinion, not fact, and therefore nonactionable. Sandmann appealed. For the following reasons, we **AFFIRM**.

I. BACKGROUND

A. Factual Background

1. The January 18, 2019 Encounter

On January 18, 2019, Sandmann attended the March for Life, a political demonstration in Washington, D.C., with over one hundred of his classmates from Covington Catholic High School, an all-boys school located in Kentucky. The group attended the demonstration, bought "Make America Great Again" hats at the

White House gift shop, then, at around 5:00 p.m., met on the Lincoln Steps, which lead from the Reflecting Pool to the Lincoln Memorial Plaza and the Memorial itself. The Lincoln Steps rise from the west end of the Reflecting Pool and are a direct exit to the Memorial from that side of the Pool.[1]

Other members of the public were in the area as well, including attendees of the Indigenous Peoples March, an unrelated political demonstration that took place in Washington, D.C. the same day. There were also five or six members of the Black Hebrew Israelites proselytizing near the Lincoln Memorial. They insulted various onlookers and passersby, including the Covington students, who received permission from a chaperone to shout school cheers and chants in response to the invective directed at them. One Covington student walked down the steps to the front of the group, took off his shirt, and led the students in loud chants reminiscent of a haka, a ceremonial Māori dance. After he rejoined the group, the students continued chanting briefly and talking amongst themselves.

Nathan Phillips had participated in the Indigenous Peoples March and was in the area by the Reflecting Pool waiting for friends. He saw the interaction between the Covington students and Black Hebrew Israelites and was concerned that it would escalate.

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[1] *See* Nat'l Park Serv., *Features of the Lincoln Memorial*, https://www.nps.gov/linc/learn/historyculture/memorial-features.htm (last visited June 23, 2023); Nat'l Park Serv., *Lincoln Memorial – Maps*, https://www.nps.gov/linc/planyourvisit/maps.htm (last visited June 23, 2023).

Phillips wanted to try and calm the situation through song, so he borrowed a drum from a musician standing nearby and began to sing a traditional Native song that expresses unity. He initially sang off to the side of the Lincoln Steps, some distance away from the two groups, then decided to walk up and stand in front of the students to put himself between them and the Black Hebrew Israelites. He approached the Covington group, drumming and singing. Over the next minute or so, students and onlookers gathered around Phillips, and the Covington students responded to his singing by jumping, chanting, whooping, and in at least one student's case, performing a "tomahawk chop" (a movement of the forearm that mimics a tomahawk axe chopping).

As the space around Phillips filled in, he became concerned for his own safety and that of others with him. He tried to exit the situation by walking up the steps towards the Lincoln Memorial, and as he began moving forward, students moved out of his way—until he reached Sandmann, who did not move. The two stood face to face as Phillips played his drum and sang. Other Covington students behind Sandmann moved aside, clearing the steps behind Sandmann that led to the Memorial for about a minute. Then, one of the students behind Sandmann appeared to wave or signal with his hand, and students who had moved aside filled back in. For the next several minutes, Phillips drummed and sang; Sandmann continued to stand there, smiling and wearing a "Make America Great Again" hat. Neither changed his position during the

encounter. When asked "What made you stand in front of the Indian guy?" Sandmann responded that "the whole thing with the black people calling us things and the guy moving through the crowd trying to intimidate us" made him "want to stand up for the school." R. 74-1, Sandmann Dep. Tr., PageID 2156-57. He explained: "I figured [it was] time for someone to plant their foot and stand there where I had been and just face up. And to me, that was standing up for the school, because I wasn't going to move." *Id.*, PageID 2158.

A chaperone then arrived and told the students to leave, and Sandman walked away. Phillips concluded his song by raising the drum, turning in a circle, and walking back toward the Reflecting Pool.

2. Media Coverage

Videos of the confrontation between a white male teenager in a "Make America Great Again" hat and an elderly Native American man went viral on social media. National media, including the five News Organizations, covered the incident at length over the following days, with most outlets quoting a statement Phillips made to the Washington Post:

> It was getting ugly, and I was thinking: I've got to find myself an exit out of this situation and finish my song at the Lincoln Memorial. I started going that way, and that guy in the hat stood in my way and we were at an impasse. He just blocked my way and wouldn't allow me to retreat.

This statement and others like it asserting that Sandmann blocked Phillips are referred to as "blocking statements." We begin by describing the News Organizations' coverage, which recounted the events of January 18, 2019, and articulated their contested nature. The online articles at issue embedded, linked to, or referenced some version of the videos, and the print articles referenced the videos as well. The dissent characterizes the News Organizations' articles as "embracing" Phillips's version of events. The articles do not: rather, they describe a contentious encounter, the meaning of which was hotly disputed by participants and witnesses.

The New York Times (the Times) published an article both online and in print on January 19. The Times issued two almost identical versions of the article; the first was headlined "Boys in 'Make America Great Again' Hats Mob Native Elder at Indigenous Peoples March," and the second "Viral Video Shows Boys in 'Make America Great Again' Hats Surrounding Native Elder.'" The only other difference between the articles was a disclaimer at the beginning of the second version, which read: "Interviews and additional video footage have offered a fuller picture of what happened in this encounter, including the context that the Native American man approached the students amid broader tensions outside the Lincoln Memorial." Both versions of the online article embedded a video of the incident immediately below the headline. The article, which did not mention Sandmann by name, described the January 18 events as seen in viral video footage and

situated them within a broader political and historical context. It included a statement from the Diocese of Covington and Covington Catholic High School condemning the students' behavior and apologizing to Phillips, as well as comments from organizers of the Indigenous Peoples March and other political and public figures. The blocking statements that Phillips had made to the Washington Post were included in a part of the article that explained who he was and described the Indigenous Peoples March in the words of its organizers and a statement from the Indigenous Peoples Movement.

CBS News Inc. (CBS) published an eight-minute-long broadcast including an interview with Phillips, as well as an associated online article embedding the video segment, both on January 20. During the broadcast, a reporter asked Phillips to recount his experience. CBS published the following statement by Phillips, which he made in that interview:

> [Sandmann] just stood in front of me, and when the others were moving aside and letting me go, he decided that he wasn't gonna do that. You know, I tried to, when I was coming up the steps, I seen him start putting himself in front of me, so I slided [sic] to the right, and he slided [sic] to the right. I slided [sic] to the left and he slided [sic] to the left—so by the time I got up to him, we were right in front of him. He just positioned himself to make

> sure that he aligned himself with me so that he stopped my exit.[2]

In the video segment, the reporter explained that a recently viral video had shown "what appears to be a standoff" between a group of high school students and a Native American man at the National Mall, but that "more information" was now available to "provide[] better context and depth to what actually happened." The reporter outlined the public discussion around the video and the judgments that people had made about the students' and Phillips's intentions. Explaining that a lengthier video had given more context, the reporter noted that "the context it provides suggests that the story is not as originally reported," observing that, for example, the video showed Phillips "insert[ing] himself into the situation." Then, the reporter explained that CBS "wanted to talk to the students, the parents, but also Mr. Phillips." The reporter then introduced the interview where Phillips provided his version of events and made the sliding statements. The broadcast displayed clips of the interaction throughout the

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[2] On appeal, Sandmann refers to this as the "sliding" statement and emphasizes its specific language. He did not address it independently before the district court in opposing summary judgment, even in his supplemental opposition to CBS's supplemental memorandum, and he mentioned the statement only briefly in his motion for partial summary judgment. CBS did not address this statement with any specificity in its motion for summary judgment either. In general, however, the parties applied the same analysis to this statement as they did to the blocking statements, and the district court addressed the CBS statement as part of its broader opinion-versus-fact discussion. We do the same.

interview with Phillips. At the conclusion of the video, the reporter reiterated that, "again, it's important to add the original story was incomplete. Now we hope you have more context . . . the video as we've seen shows Mr. Phillips walking into the group, inserting himself, trying to diffuse the situation between the students and the Black Hebrew Israelites." The online article associated with the video cited both Phillips's and Sandmann's explanations of the event, and it quoted from a statement that Sandmann issued before including the statement Phillips had made in the CBS interview.

ABC News Inc. (ABC) published four articles that were initially the subject of this action, as well as several broadcasts about the incident that were embedded in those articles. The first online article, titled "Viral video of Catholic school teens in 'MAGA' caps taunting Native Americans draws widespread condemnation; prompts a school investigation," was published on January 20. The article summarized the incident and quoted the blocking statements Phillips had made to the Washington Post. Immediately after Phillips's statement, the article quoted a statement from an anonymous Covington student providing a different description of the situation: "[A]n Indigenous American man with a few other men approached the center of the boys and in particular one boy (who goes to my school but I do not know him). He was beating his drum and chanting something that I couldn't understand. The boy from my school didn't say anything or move—he just stood there." The article then quoted a

college student present during the encounter who said that the group of Indigenous Peoples March attendees had been peaceful. The article then included a statement from Sandmann, who said, "I realized everyone had cameras and that perhaps a group of adults was trying to provoke a group of teenagers into a larger conflict. I was not intentionally making faces at the protestor. I did smile at one point because I wanted him to know that I was not going to become angry, intimidated or be provoked into a larger confrontation." And, like, the Times article, the first ABC article reported on comments made by other public figures.

The second ABC article, also published on January 20, was substantially similar to the first and again contained the blocking statements. This article primarily reported Sandmann's and Phillips's perspectives and statements on the encounter, along with the joint statement from the Diocese of Covington and Covington Catholic High School. It began with a section of Sandmann's statement, then quoted Phillips's blocking statements and other statements he had made to the press, then returned to Sandmann's statement, noting that he "disputed" Phillips's claims. The third and fourth ABC articles, both published on January 21, discussed new additional videos that offered "a fuller picture" of what precipitated the encounter. Both articles contained a characterization of Phillips's blocking statements: "Some students backed off, but one student wouldn't let him move, he added." These articles similarly focused on Sandmann's and Phillips's perspectives, with the third article characterizing them as

"dueling accounts" and the fourth explaining that Sandmann had "shared his side of the story" in his statement. Both articles also included their own, independent descriptions of the videotaped events.

Rolling Stone published an article on January 22, 2019, titled "Trump Comes to the Rescue of the MAGA Teens." The article explained that "in a widely circulated clip, Phillips was taunted by the teens" but that "Sandmann released a statement alleging otherwise," linking to and quoting part of that statement in the article. The article focused on President Trump's reaction to the incident and the broader controversy that had come to surround it. It quoted Sandmann's statement multiple times and noted that "[a]dditional videos confirm Sandmann's claim" that the Covington students were being harassed by the Black Hebrew Israelites. The article then discussed Phillips's perspective, noting that he "said he felt threatened" and quoting the blocking statements. The last sentence noted that Sandmann would "continue to tell his side of the story when he sits down with Savannah Guthrie of the Today Show[.]"

Finally, Gannett Co. (the Cincinnati Enquirer, Detroit Free Press, Louisville Courier-Journal, the Tennessean, and USA TODAY, or collectively, Gannett) published nine print and online articles about the encounter between January 19 and January 30. The Gannett articles all included the blocking statements or statements of a similar nature, including descriptions of Phillips "trying" to walk away but being "blocked," and of Sandmann "[standing] in his way."

Many of the Gannett articles noted that accounts of the encounter varied. For instance, an online Cincinnati Enquirer article published on January 19 and updated on January 20 quoted Sandmann's statement and explanation that he "believed that by remaining motionless and calm, [he] was helping to diffuse [sic] the situation," then reported that a spokesman for the Indigenous Peoples March said that Phillips had approached the students "in an attempt to defuse the situation." The article quoted the blocking statements, followed by a section of Sandmann's statement that said he "never felt like [he] was blocking the Native American protestor," and that it "was clear to [him] that [Phillips] had singled [him] out for a confrontation." Similarly, the first two paragraphs of a Cincinnati Enquirer article published online on January 20 and in print on January 24 noted that there was "intense debate about how, exactly, the encounter played out," and that "the question of each party's intent has been hotly contested." The article quoted Sandmann's statement multiple times in its description of the events as shown on video, cited Phillips's explanation that he was "trying to defuse the situation," and quoted the blocking statements. Another Cincinnati Enquirer article published online on January 24 and in print on January 25 discussed Phillips's appearance on the "Today" show, which Sandmann had also appeared on, and described Phillips's disagreement with Sandmann's statement. The Detroit Free Press article on that same "Today" show appearance similarly noted that "[w]hile Sandmann said he wished the students had walked

away, Phillips explained he tried to walk away and was blocked."[3]

B. Procedural History

Sandmann initially sued the Washington Post in February of 2019, then CNN and NBC shortly thereafter, claiming defamation under Kentucky law based on those outlets' publication of allegedly false statements about him. *See Sandmann v. WP Company LLC* (*Washington Post*), No. 2:19-cv-19 (E.D. Ky. 2019); *Sandmann v. CNN*, No. 2:19-cv-31 (E.D. Ky. 2019); *Sandmann v. NBC*, No. 2:19-cv-56 (E.D. Ky. 2019).[4] The district court granted the Washington Post's motion to dismiss, concluding that some of the challenged statements were not "about" Sandmann as contemplated by defamation law. *See Sandmann v. WP Co. LLC*, 401 F. Supp. 3d 781, 791, 797 (E.D. Ky. 2019). Others—

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[3] In providing its summary of the at-issue news coverage, the dissent emphasizes that many of the articles mentioned a statement by Phillips that he heard the students chanting "build that wall," a phrase referring to President Trump's plan to build a wall between the United States and Mexico. The phrase cannot be heard on audio of the incident, and, as some of the News Organizations reported, Sandmann said that he did not hear any students chant it. Whether Phillips's statement about the chanting is true or not, it is not at issue. Sandmann's lawsuit is about the blocking statements and the statement Phillips made in his CBS interview.

[4] Unless otherwise specified, all lower-court citations are to *Sandmann v. The New York Times Company*, 2:20-cv-23 (E.D. Ky. 2020). Citations beginning with "CBS" refer to case number 2:20-cv-24, which was also filed in the Eastern District of Kentucky in 2020.

including the blocking statements—were statements of opinion and therefore non-actionable. *Id.* at 791-93. The district court emphasized that "[f]ew principles of law are as well-established as the rule that statements of opinion are not actionable in libel actions." *Id.* at 791. And even if the statements were "about" Sandmann or statements of fact, the court determined, they did not have a defamatory meaning. *See id.* at 793-97.

Sandmann moved for reconsideration of that ruling and for leave to file an amended complaint. He argued that the district court had prematurely resolved the issue of whether statements were opinion or fact and that the factual record needed further development. *See Washington Post* R. 49-1, R. 60. The district court granted Sandmann's motion as to three statements "to the extent that [they] state that plaintiff 'blocked' Nathan Phillips and 'would not allow him to retreat.'" *Washington Post* R. 64, PageID 861. Finding that the three statements "pass[ed] the requirement of 'plausibility,'" after discovery as to those statements and their context, the court would "consider them anew" at summary judgment. *Id.* The court entered companion rulings in the CNN and NBC cases. *CNN* R. 43; *NBC* R. 43. The Washington Post, CNN, and NBC cases all eventually settled without a final determination by the district court on the merits. *Washington Post* R. 81; *CNN* R. 69; *NBC* R. 83.

In March of 2020, Sandmann filed the five at-issue lawsuits against the Appellees, again alleging defamation under Kentucky law. The district court denied the News Organizations' motions to dismiss, holding that

its rulings in *Washington Post* applied equally to Sandmann's new lawsuits. *E.g.*, R. 27. The parties agreed to narrow and bifurcate discovery and summary judgment practice, with the first phase of the case to focus on "the facts pertaining to the encounter" between Sandmann and Phillips, specifically "whether Nathan Phillips' statements that Plaintiff 'blocked' him or 'prevented him from retreating' . . . are true or substantially true, or otherwise not actionable based on the undisputed facts developed during initial discovery and the issues defined in the Court's prior decisions." R. 38, PageID 303-04. After the first phase of discovery, Sandmann moved for partial summary judgment on the issue of falsity, and the Appellees jointly cross-moved for summary judgment.

In 2022, the district court granted the News Organizations' motion. "[A]pply[ing] the same analysis" to all the statements at issue, the court concluded that the challenged statements were objectively unverifiable and therefore unactionable opinion. The court explained that Phillips's statements relied on assumptions about both his and Sandmann's state of mind, and that a reasonable reader would understand that Phillips was "conveying his view of the situation." The court did not reach Appellees' alternative argument that the challenged statements were substantially true, and mooted Sandmann's cross-motion for partial summary judgment. Sandmann timely appealed in each case, and all five appeals were consolidated.

II. ANALYSIS

On appeal, Sandmann raises two arguments: (1) the district court erred in not applying the law of the case doctrine because, before ruling on the parties' summary judgment motions, it had already determined that the statements were fact, not opinion, and (2) the district court incorrectly determined that the challenged statements were opinion rather than fact. Appellees urge affirmance on the basis of the statements' opinion status or on any of three additional, alternative grounds.

A. Law of the Case

Before we reach the heart of Sandmann's appeal, a brief discussion of the law of the case doctrine is in order. As the name of the doctrine suggests, "findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation." *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994). So that litigants are treated consistently, where an issue is "actually decided," "the same issue presented a second time in the same case in the same court should lead to the same result." *Howe v. City of Akron*, 801 F.3d 718, 739 (6th Cir. 2015) (emphasis omitted) (quoting *Sherley v. Sebelius*, 689 F.3d 776, 780 (D.C. Cir. 2012)). We review district courts' application of this doctrine for abuse of discretion. *Rouse v. Daimler-Chrysler Corp.*, 300 F.3d 711, 715 (6th Cir. 2002).

Sandmann claims that, because the district court reconsidered its opinion dismissing the blocking

statements as opinion, it "reversed itself" and determined that those statements provided a basis for liability (i.e., were fact). He relies on the companion orders in *Washington Post, CNN*, and *NBC*, which concluded that the blocking statements sufficiently "pass[ed] the requirement of 'plausibility'" and thus survived the motions to dismiss of the News Organizations. He also cites the court's discovery order in the five cases before us, which instructed the parties to focus on "whether Nathan Phillips' statements that Plaintiff 'blocked' him or 'prevented him from retreating' . . . are true or substantially true, or otherwise not actionable based on the undisputed facts developed during initial discovery and the issues defined in the Court's prior decisions." Without an implied ruling that the statements were factual, Sandmann argues, the court's directive to determine their truth or falsity would be "incomprehensible."

The *Washington Post* order did not establish any law of the case as to the statements' opinion or factual nature. In that order, the court deemed the statements plausible enough to overcome a motion to dismiss, but it also explained that it would "consider [the issues] anew on summary judgment" and in fact never ultimately issued an order on the merits before *Washington Post, CNN*, and *NBC* settled.

The discovery order in the five cases at hand is similarly inconclusive. In addition to contemplating discovery specifically related to the truth of the statements, it also instructed the parties to conduct discovery about whether the statements are "otherwise not

actionable." Given that opinions may be nonactionable under Kentucky defamation law, the district court's directive therefore left open the question of whether the statements were opinion or fact. Moreover, the order's language was identical to language in the parties' jointly submitted report about the scope of contemplated discovery. We find no merit to Sandmann's suggestion that all five defendants silently agreed to limit discovery in a way that implicitly conceded an element essential to the case. The law of the case doctrine does not apply, and the district court did not abuse its discretion in resolving the opinion issue at summary judgment.

B. Summary Judgment

We review the district court's grant of summary judgment de novo, drawing all reasonable inferences in favor of the nonmoving party. *SunAmerica Hous. Fund 1050 v. Pathway of Pontiac, Inc.*, 33 F.4th 872, 878 (6th Cir. 2022). Summary judgment is appropriate when the moving party shows that there are no genuine disputes of material fact and that it is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(a). "[W]here, as here, there is 'a videotape capturing the events in question,' the court must 'view[ ] the facts in the light depicted by the videotape.'" *Green v. Throckmorton*, 681 F.3d 853, 859 (6th Cir. 2012) (quoting *Scott v. Harris*, 550 U.S. 372, 378, 381 (2007)) (second alteration in *Green*).

1. Opinion Versus Fact

Because Sandmann invoked diversity jurisdiction, Kentucky substantive law applies. *See Himmel v. Ford Motor Co.*, 342 F.3d 593, 598 (6th Cir. 2003). In Kentucky, a cognizable claim for defamation requires:

> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[5]

Toler v. Süd-Chemie, Inc., 458 S.W.3d 276, 282 (Ky. 2014) (internal footnote omitted) (quoting Restatement (Second) of Torts § 558 (Am. L. Inst. 1977) [hereinafter Restatement]). The crux of this appeal is the challenged statements' actionability. "Whether a statement qualifies for protection under the constitutional pure opinion privilege is a legal question to be decided by the court, not a question for the jury." *Cromity v. Meiners*, 494 S.W.3d 499, 504 (Ky. Ct. App. 2015) (citing *Yancey v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1989);

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[5] The parties agree that because Kentucky has rejected the doctrine of "neutral reportage," a newspaper may still be held liable for quoting "newsworthy statements" of third parties. *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 886-87 (Ky. 1981).

Biber v. Duplicator Sales & Serv., Inc., 155 S.W.3d 732 (Ky. Ct. App. 2004)).

The First Amendment protects statements that "cannot reasonably be interpreted as stating actual facts about an individual" in "recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues." *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20, 22 (1990) (quotation marks and alterations omitted). *See Counterman v. Colorado*, ___ U.S. ___, 143 S.Ct. 2106, 2115 (2023) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)) ("False and defamatory statements of fact, we have held, have 'no constitutional value.'") In other words, "a viable defamation claim exists only where a reasonable factfinder could conclude that the challenged statement connotes actual, objectively verifiable facts." *Compuware Corp. v. Moody's Inv. Services, Inc.*, 499 F.3d 520, 529 (6th Cir. 2007). *See also Milkovich*, 497 U.S. at 21 (statement not opinion where it "is sufficiently factual to be susceptible of being proved true or false" based on "objective evidence").

Kentucky law similarly protects opinion statements from having a defamatory meaning but adopts the Restatement (Second) of Torts' approach to distinguishing between "pure" and "mixed" opinion. *Yancey*, 786 S.W.2d at 857. Pure opinion is absolutely privileged and is based on disclosed facts or on facts known or assumed by both parties to the communication. *Id.* The Restatement explains that a pure opinion "may be ostensibly in the form of a factual statement if it is clear from the context that the maker is not intending

to assert another objective fact but only his personal comment on the facts which he has stated." Restatement § 566 cmt. b. An opinion may, however, be defamatory and actionable if it is mixed, i.e., "if it implies the allegation of undisclosed defamatory fact as the basis for the opinion." *Yancey*, 786 S.W.2d at 857 (quoting Restatement § 566). The allegedly defamatory statement is to be "construed as a whole," *id.* (quoting *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981)), and "in the sense in which the readers to whom it is addressed would ordinarily understand it," *id.* at 858 (quoting *Gearhart v. WSAZ, Inc.*, 150 F. Supp. 98, 109 (E.D. Ky. 1957)).

The opinion-versus-fact inquiry thus typically involves two steps under Kentucky law. First, the court determines whether a statement is fact or opinion. If the statement is factual, the analysis ends there; the statement is considered capable of defamatory meaning. But if the statement is one of opinion, the court then determines whether that opinion is based on undisclosed defamatory facts. If so, the statement is capable of defamatory meaning; if not, it is protected opinion. Here, the district court held that the blocking statements "did not imply the existence of any nondisclosed defamatory facts," and Sandmann does not challenge that aspect of its holding. So, if the blocking statements are opinion, they are protected by the Constitution and by Kentucky law.

The way a statement is presented or worded affects the ultimate legal determination of whether it is a fact or opinion. For example, "loose" or "figurative"

language can "negate the impression" that the speaker was "seriously maintaining" an assertion of fact. *Milkovich*, 497 U.S. at 21. So can "the general tenor" of an article. *Id.* Kentucky courts have found statements to be opinion where those statements were couched in qualifying terms, *see Williams v. Blackwell*, 487 S.W.3d 451, 453, 455-56 (Ky. Ct. App. 2016); sufficiently subjective, *see Cromity*, 494 S.W.3d at 503-04; or clearly intended to be opinion when "evident from the totality" of their context, *see Seaman v. Musselman*, No. 2002-CA-001269-MR, 2003 WL 21512489, at *4 (Ky. Ct. App. July 3, 2003). The inquiry is setting-specific: that a statement may be capable of objective verification in some contexts does not make it an objectively verifiable fact in *every* context. Contrary to Sandmann's claim, there is no bright-line rule that statements based on sensory perceptions are necessarily factual.

Start with Phillips's statement to the Washington Post. First, he explained that his goal was to "find . . . an exit out of this situation." Having articulated that aim, he then described himself and Sandmann as at an "impasse," a term that can be literal or figurative. *See* Oxford English Dictionary, *Impasse (Noun)*, https://www.oed.com/view/Entry/92128 (last visited June 22, 2023). Then, based on Phillips's perception of Sandmann's reaction to his attempt to leave the area, he said that Sandmann "blocked" him and would not "allow" him to retreat. Whether or not a video shows Phillips attempting to move around or away from Sandmann—or indeed any active movement—does not help us ascertain or objectively verify whether Phillips

accurately interpreted Sandmann's actions as purposefully "prevent[ing]" his "passage" away from the crowd to the Lincoln Memorial or refusing to "approve" his exit. Oxford English Dictionary, *Block (Verb)*, https://www.oed.com/view/Entry/20348 (last visited August 9, 2023); Oxford English Dictionary, *Allow (Verb)*, https://www.oed.com/view/Entry/5460 (last visited August 9, 2023). And "retreat" need not literally mean to move backwards. The word also means to "withdraw" or "back down" figuratively. Oxford English Dictionary, *Retreat (Verb)*, https://www.oed.com/view/Entry/164427 (last visited August 9, 2023).

As the district court noted, Sandmann and Phillips never spoke to each other during the encounter. It is unclear whether Sandmann knew that students behind him had stepped aside as Phillips approached, which made him the single person standing between Phillips and the Memorial—or whether *Phillips* knew that Sandmann might have been unaware of that fact. The lack of clarity as to Sandmann's understanding of the situation makes the blocking statements all the more subjective in nature: based on the fact that Sandmann "stood in [Phillips's] way," Phillips felt that he was "blocking" him and not "allowing" his retreat. There is no way to determine what Sandmann's intent was from the videos of the encounter, which approximate the information available when Phillips made the blocking statements. *See Cromity*, 494 S.W.3d at 503-04 (defendant's contention that he was not speeding was not provable as false where the evidence available was defendant's "word against" plaintiff's).

The blocking statements are comparable to those in *Macineirghe v. County of Suffolk*, No. 13-cv-1512, 2015 WL 4459456 (E.D.N.Y. July 21, 2015). There, the police were following a man and his son, and the man fell down in front of a police car, which prevented the police from pursuing the car his son was in. *Id.* at *3-4. A defendant who was present later provided a witness statement that said, "[t]he older individual then blocked the police vehicle from attempting to chase the [car]. I then saw the older man throw himself to the ground in an attempt to fake being struck by a police car." *Id.* at *7. Applying New York law (which, like Kentucky, protects pure opinion but not mixed opinion), the court found as a matter of law that the defendant's assertion—"falling to the ground" was "an attempt to 'block' the car"—was pure opinion based on the defendant's observations of the man's actions. *Id.* at *14; *see Sandmann v. WP Co.*, 401 F. Supp. 3d 781, 792-93 (E.D. Ky. 2019) (citing *Macineirghe* in initial grant of the Washington Post's motion to dismiss Sandmann's defamation claim). Like the *Macineirghe* statement, the blocking statements here reflect Phillips's perception of Sandmann's intent as Sandmann stood on the Lincoln Steps.

The statement Phillips made to CBS is of a similar nature. Even if we assume that Sandmann's physical movements left or right are objectively verifiable, Phillips described those movements as support for his conclusion that Sandmann "decided" he would not move aside and "positioned himself to make sure that he aligned himself with [Phillips] so that he stopped [his]

exit." Here, too, Phillips ascribed subjective intent to Sandmann's conduct. *See* Restatement § 566 cmt. b ("[Pure opinion] occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct[.]").

Caselaw underscores the importance of considering Phillips's statements in their totality and in the context of the available evidence. Consider *Milkovich*, where a former Ohio high school wrestling coach alleged defamation by a newspaper and reporter. 497 U.S. at 3-4. The reporter had authored an article in a local newspaper claiming that the coach had lied under oath at a state board proceeding. *Id.* at 4-5, 110 S.Ct. 2695. On review, the Supreme Court held, in part:

> [T]he connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination whether petitioner lied in this instance can be made *on a core of objective evidence* by comparing, *inter alia*, petitioner's testimony before the [] board with his subsequent testimony before the trial court.

Id. at 21, 110 S.Ct. 2695 (emphasis added). The defamatory language in question was "an articulation of an objectively verifiable event." *Id.* at 22, 110 S.Ct. 2695 (quoting *Scott v. News-Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699, 707 (1986)). We have interpreted *Milkovich* to stand for the proposition that "a viable defamation claim exists only where a reasonable factfinder could conclude that the challenged statement connotes

actual, objectively verifiable facts." *Compuware*, 499 F.3d at 529 (citing *Milkovich*, 497 U.S. at 21). Here, videos showed Phillips walking forward into a crowded area, multiple people moving out of his path, and Sandmann standing in front of Phillips. But whether Sandmann "blocked" Phillips, did not "allow" him to retreat, or "decided" that he would not move aside and "positioned himself" so that he "stopped" Phillips are all dependent on perspective and are not "susceptible" of being proven true or false under the circumstances.[6] Unlike the testimony in *Milkovich*, there is no "core of objective evidence" that allows us to discern Sandmann's intentions during the encounter.

Also consider *Croce v. Sanders*, 843 F. App'x 710 (6th Cir. 2021). There, Sanders contacted the New York Times about statistical inaccuracies in scientific articles authored by Croce. *Id.* at 712-13. The resulting New York Times article explained that Sanders "has made claims of [Croce's] falsified data and plagiarism directly to scientific journals." *Id.* at 714. The article then quoted Sanders, who said, "It's a reckless disregard for the truth." *Id.* Also, in the process of his investigation, the journalist who authored the article had written a letter to Croce and his university. That letter included a sentence with two allegedly defamatory statements: "Dr. Sanders argues—because in his observation [1] the image fabrication, duplication and

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[6] Phillips was not required to use qualifying terms to signal that he was relaying his perception of the encounter. A statement that uses such terms "may still imply a false assertion of fact." *Milkovich*, 497 U.S. at 19.

mishandling, and plagiarism in Dr. Croce's papers is routine . . . —that [2] Dr. Croce is knowingly engaging in scientific misconduct and fraud." *Id.* at 714-15 (emphasis omitted).

We held that Sanders's quote in the article expressed his opinion because it used the term "reckless," an "imprecise" adjective which "signal[ed] to the listener that the speaker is expressing a subjective point of view." *Id.* at 714. As for the statements in the letter, we explained that "[t]o say something is routine is to make an imprecise characterization that 'lacks a plausible method of verification.'" *Id.* at 715 (quoting *Vail v. The Plain Dealer Publ'g Co.*, 72 Ohio St.3d 279, 649 N.E.2d 182, 186 (1995)). "[T]here is no objective line" that determines "[h]ow many problems make something routine." *Id.* "Instead, the line varies from speaker to speaker and from context to context." And, even though the second statement may have "look[ed] like a statement of fact standing alone, *the full sentence* [made] clear that this statement [was] an expression of Sanders's opinion." *Id.* (emphasis added). The statement, which was based on Sanders's observations, was "neither an assertion of fact nor a conclusion that follows incontrovertibly from asserted facts as a matter of logic." *Id.* It was "instead a subjective take that is up for debate." *Id.* The statement's "broader context" reinforced that conclusion. *Id.* at 717.

As in *Croce*, Phillips's statements that Sandmann "decided" he would not move aside, "blocked" Phillips, would not "allow" him to retreat, and "positioned himself" so that he "stopped" him are contextual and

subjective, not "a conclusion that follows incontrovertibly from asserted facts." *Id.* at 716. Phillips's statements expressed his subjective understanding of the situation and of Sandmann's intent, an understanding informed by the pair's proximity, the other students' movement, and the lack of communication during the encounter.

Moreover, the statements appeared in stories that provided multiple versions and descriptions of the events, putting a reasonable reader on notice that Phillips's statements were merely one perspective among many. The online articles at issue embedded or linked to some version of the video, effectively disclosing the facts upon which Phillips's opinion was based; readers were able to determine for themselves whether they interpreted the encounter as Sandmann deciding to block Phillips, positioning himself to stop him, or not allowing him to retreat. And Gannett's print articles also presented Phillips's statements in a way that clearly framed his statements as his own perspective of the incident. The Kenton Recorder, for instance, explained that "[a]ccounts of the episode vary widely and the question of each party's intent has been hotly contested," and that the "[initial] video alone only tells part of the story." The article then recounted the encounter in detail and provided accounts from both Sandmann and Phillips. The other two print articles did not even include the allegedly defamatory statements, only Phillips's statement that he had tried to walk away.

Phillips's statements are opinion, not fact. In making this finding, we are not engaging in speculation or reading improper inferences into Phillips's statements, as the dissent suggests. Rather, we are engaging in the task required of us: a legal interpretation of Phillips's statements in their context within the News Organizations' articles. The statements' opinion-versus-fact status is "not a question for the jury." *Cromity*, 494 S.W.3d at 504.

Because the statements are opinion, they are protected by both the Constitution and Kentucky law, and they are non-actionable. The district court did not err in so concluding.

2. Appellees' Alternative Grounds

Appellees raise three alternative grounds for affirmance: (1) the statements are substantially true; (2) the statements are not defamatory; and (3) Sandmann's lawsuits are barred by the Kentucky statute of limitations. Because the statements are nonactionable, we need not address these grounds.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's judgment.

DISSENT

GRIFFIN, Circuit Judge, dissenting.

These cases raise classic claims of defamation. Through their news reporting, defendants portrayed plaintiff Nicholas Sandmann as a racist against Native Americans. Their characterization of Nicholas was vicious, widespread, and false. Defendants' common narrative was readily accepted and effective to the extent that, on national television, NBC's[1] Today Show host Savannah Guthrie asked the 16-year-old if he thought he "owe[d] anybody an apology" for his actions and if he saw his "own fault in any way."[2] Moreover, the false portrayal of Nicholas caused the Diocese of Covington to issue an apology for its parishioner's actions. An apology that was later retracted once the Diocese learned the truth.

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[1] Previously, NBC, CNN, and the Washington Post settled Sandmann's defamation cases against them following the denial on reconsideration of their motions to dismiss. Case No. 2:19-cv-19 (E.D. Ky.), R. 47, 64, 81 (Washington Post); Case No. 2:19-cv-31 (E.D. Ky.), R. 44-45, 69 (CNN); Case No. 2:19-cv-56 (E.D. Ky.), R. 43, 83 (NBC).

[2] Case No. 2:19-cv-56 (E.D.Ky.), R. 23, ID 324; @TODAYshow, TWITTER (Jan. 22, 2019, 5:36 PM), https://twitter.com/TODAYshow/status/1087841570479632384; *Nick Sandmann speaks out on viral encounter with Nathan Phillips*, TODAY (Jan. 23, 2019), https://www.today.com/video/nick-sandmann-speaks-out-on-viral-encounter-with-nathan-phillips-1430461507922.

The truth is depicted on eighteen stipulated videos of the incident, which unequivocally show that 16-year-old Nicholas Sandmann did nothing more than stand still and smile while confronted by a stranger.[3]

These cases should be submitted to a jury to decide the factual issue of whether each defendant exercised reasonable care in its reporting. I disagree that summary judgment is appropriate. In this regard, the majority opinion affirms the summary judgment granted in favor of all defendants, not on the basis that their reporting was substantially true or that plaintiff was a public figure necessitating a claim of malice, but on the ground that all the news articles were opinion, not fact. I disagree and would reverse and remand for further proceedings.

In my view, the statements that Sandmann blocked Nathan Phillips's ascension to the Lincoln Memorial; prevented Phillips from retreating; and impeded Phillips's movements by stepping to his left and stepping to his right, were actions capable of objective verification. Thus, because these events can be objectively verified, I would hold that the opinion exception to the laws of defamation does not apply.

I.

Defendants are media entities that covered the incident at the Lincoln Memorial; none of the reporters

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[3] The eighteen videos are accessible at https://www.opn.ca6.uscourts.gov/media/mediaopn.php.

who wrote the news articles at issue witnessed the event. Many of the defamatory statements are reprintings of the following statement Phillips gave to the Washington Post:

> It was getting ugly, and I was thinking; I've got to find myself an exit out of this situation and finish my song at the Lincoln Memorial. I started going that way, and that guy in the hat stood in my way, and we were at an impasse. He just blocked my way and wouldn't allow me to retreat.

Case No. 2:20-cv-23 (E.D. Ky.), R. 53-2, ID 729 (Affidavit of Nathan Phillips); Cleve R. Wootson Jr., Antonio Olivo, and Joe Heim, '*It was getting ugly': Native American drummer speaks on his encounter with MAGA-hat-wearing teens*, THE WASHINGTON POST (January 22, 2019) https://www.washingtonpost.com/nation/2019/01/20/it-was-getting-ugly-native-american-drummer-speaks-maga-hat-wearing-teens-who-surrounded-him/. The articles share a common narrative. Each title sets the tone and vilifies Sandmann; meanwhile, the contents cast him in a negative light while often praising Phillips and embracing his version of events as authoritative and factually accurate.

A.

Sandmann alleges that two versions of a January 19, 2019, article by the New York Times Company were defamatory. The original headline was "Boys in 'Make America Great Again' Hats Mob Native Elder at

Indigenous Peoples March," and the revised headline was "Viral Video Shows Boys in 'Make America Great Again' Hats Surrounding Native Elder." The only other difference between them was a disclaimer at the beginning of the revised version: "Interviews and additional video footage have offered a fuller picture of what happened in this encounter, including the context that the Native American man approached the students amid broader tensions outside the Lincoln Memorial. Read the latest article here."

The article began with a video of Phillips facing Sandmann; its caption reported Phillips's false claim that the students chanted "build that wall" when he was in their midst and editorialized that "[t]he episode . . . was widely condemned."[4] Without explaining that Phillips approached the students, the article described an "unsettling encounter" with "a throng of cheering and jeering high school boys, predominantly white and wearing [red] 'Make America Great Again' gear, surrounding a Native American elder." After noting that

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[4] Phillips gave an interview near the Lincoln Memorial Reflecting Pool after Sandmann walked away. During the interview, Phillips claimed the Covington Catholic High School students chanted "build that wall." However, the audio of the video evidence demonstrates that the students did not make such a chant. "Build the wall" is a reference to President Trump's vow to secure the southern border by building a wall between the United States and Mexico. Defendant New York Times has characterized "build the wall" as a "racist chant." Case No. 2:20-cv-23 (E.D. Ky.), R. 1, ID 35; Jamelle Bouie, *Trump's Wall of Shame*, THE NEW YORK TIMES (Jan. 24, 2019), https://www.nytimes.com/2019/01/24/opinion/trump-wall-shutdown.html. The "build that wall" chant is not at issue on appeal.

the students could face school discipline up to expulsion, the article politicized the standoff: "In video footage that was shared widely on social media, one boy, wearing the red hat that has become a signature of President Trump, stood directly in front of the elder, who stared impassively ahead while playing a ceremonial drum."[5]

Next, the article quoted a statement by the Diocese of Covington and Covington Catholic High School (where Sandmann was a student), apologizing for the incident. It then characterized the event as "the latest touchpoint for racial tensions in America," and stated that "[t]he episode drew widespread condemnation from Native Americans, Catholics and politicians alike." The article then identified Phillips, quoted his Washington Post statement, and reiterated his claim that the students chanted "build that wall." After briefly discussing the Indigenous Peoples March (an event to celebrate Native Americans and raise awareness as to that community's issues, which Phillips attended), the article closed by quoting the Kentucky Secretary of State, who called the incident a "horrific scene[]."

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[5] Sandmann bought his "Make America Great Again" hat that day as a souvenir after he and his classmates visited the White House.

B.

Sandmann alleges that four articles by ABC News, Inc. were defamatory.

1.

ABC published its first article on January 20, 2019, with the headline "Viral video of Catholic school teens in 'MAGA' caps taunting Native Americans draws widespread condemnation; prompts a school investigation." The article opened with the assertion that "[o]utrage spread across the political spectrum" about the confrontation and stated that the students "appeared to mock and chant over the voices of a small group of Native Americans." "The most jarring of several viral videos," it proclaimed, showed Sandmann "stand[ing] motionless and smirking for more [than] three minutes" at Phillips. It continued: "Phillips remain[ed] outwardly placid and composed throughout the viscerally distressing confrontation."

Focusing on Phillips, the article quoted his statement that students chanted "build that wall," followed by a picture of Sandmann captioned: "[a] diocese in Kentucky apologized" for "a student in a 'Make America Great Again' hat mocking Native Americans outside the Lincoln Memorial." The article then reprinted the Washington Post statement before quoting an unnamed student who stated that Phillips approached the students and Sandmann "didn't say anything or move—he just stood there." It also stated that one witness claimed, "no one from the Native American group

instigated the episode." Only then did the article mention that Sandmann had released a written statement, noting that he "defended" his actions and he did not hear "any students chant 'build that wall' or anything hateful or racist at any time." The article omitted the portion of Sandmann's statement asserting that he did not block Phillips.

After describing reactions and "[f]ury" over the confrontation, the article included a picture with an editorial caption: "students mock[ed] Native Americans outside the Lincoln Memorial." Next, a "conservative commentator['s]" reaction was highlighted, calling the students "#MAGA brats" whose behavior was in contrast with "the calm dignity and quiet strength of Mr. Phillips." The ABC article then compared the confrontation at the Lincoln Memorial to an incident earlier in the week in which President Trump tweeted about "the Wounded Knee Massacre and the Battle of Little Bighorn" and the negative reactions that followed President's Trump's tweet. Finally, the article concluded with a quote from a journalist "covering Native American issues," who noted that Phillips had "been the subject of racism and ridicule many times in his life" and "to see him stand there and maintain his composure and resolve was just an incredible testament to his heart and his ability to be a warrior."

2.

The same day, ABC published a second article with the headline "Teen accused of taunting Native

American protesters in viral video says he's receiving death threats." The subheading stated "Sandmann was accused of mocking a Native American protester on Friday." A video at the top of the article was captioned: "The teens seen appearing to mock a group of Native Americans that drew widespread condemnation revealed what allegedly happened before and after the incident."

The article's body first quoted part of Sandmann's statement, in which he said he had "been falsely accused," he "never interacted" with Phillips, and he "was startled and confused as to why [Phillips] approached [him]." It then switched to Phillips's version of events, noting that he "said the teens yelled derogatory comments at him before the stare down took place." The article repeated Phillips's false claim that students chanted "build that wall" and reprinted the Washington Post statement. The article then noted that Sandmann refuted these claims, quoting portions of his statement that no students chanted "build that wall" and no one tried to block Phillips. After noting that Sandmann and his parents had received death threats because of the confrontation, the article included an excerpt from the statement by the Diocese of Covington and Covington Catholic condemning the students. The article concluded by returning to Sandmann's statement, noting that he "defended his actions" and "planned to cooperate with the school's ongoing investigation."

3.

The next day, ABC published a third article, this time with the headline "Videos show fuller picture of DC clash between high school students, Native Americans." The article noted that additional video showed the leadup to the confrontation with a group of Black Hebrew Israelites (a religious group that advocates for racial separatism and views African Americans as descendants from the Hebrews in the Bible; it was proselytizing loudly in the area with aggressive and derogatory language). And it linked to Sandmann's statement before quoting Phillips as saying, "I realized I had put myself in a really dangerous situation." Directly below that quote, the article embedded a video with a caption noting that Phillips was "mocked and taunted by a group of young men." The article continued, stating that Sandmann "claim[ed] he was the one trying to deescalate the situation." It also noted that Sandmann thought the adults—not the students—were to blame; yet the article asserted the video of the incident "gave many who watched it a different impression." The article then repeated Phillips's claim that students chanted "build that wall" and that Sandmann "wouldn't let [Phillips] move." After this, the article switched back to Sandmann's version of events, quoting him as saying that he "did not see anyone try to block [Phillips's] path." The article concluded by noting that the Diocese of Covington "apologized for the incident" and "promised to take 'appropriate action, up to and including expulsion.'"

4.

The fourth ABC article was also published on January 20, 2019, with the headline "Students in 'MAGA' hats taunt indigenous elder, demonstrators in Washington: VIDEO." A video captioned "Jarring videos show a crowd of teenage boys sporting 'Make America Great Again' hats as they seemingly intimidate and mock a group of Native Americans at the Indigenous Peoples March in Washington, D.C." appears before the article's text. The article itself opens by stating that Phillips "was seen in online video being taunted outside the Lincoln Memorial." After explaining that Phillips was trying to deescalate the conflict between the Black Hebrew Israelites and the Covington Catholic students, the article noted that video showed the students and Black Hebrew Israelites "taunt[ing]" each other. It then turned to Sandmann, noting that video showed him "stand[ing] directly in front of and star[ing] at Phillips." The article reprinted part of Sandmann's statement saying he was trying "to diffuse [sic] the situation" by "remaining motionless and calm," and that he "never felt like [he] was blocking" Phillips. But the article also quoted another Native American protester who claimed he and Phillips were attempting "to defuse the situation" by approaching the students. After quoting Phillips's claims that the students chanted "build that wall" and that he was blocked, it returned to the other protester, who stated that he "feared the crowd could turn ugly," although the students eventually changed from "mocking [the Native Americans] and laughing" at them to "singing

with [them]." Right after this, the article quoted the unnamed student who claimed that Sandmann "didn't say anything or move—he just stood there. As time went on the man with the drum got closer to his face." The article concluded with the statement from the Diocese of Covington apologizing to Phillips, criticizing the students, and stating that students could be expelled.

C.

Sandmann alleges that a news clip and an article by CBS News, Inc. were defamatory.

1.

The January 20, 2019, CBS news clip opens with the anchor stating:

> If you've been anywhere near your social media this weekend, checking in on your phone, you may have seen a video that shows a group of high school students in what appears to be a standoff with a Native American man on the National Mall in Washington, D.C. The problem is the story as originally reported is incomplete. We have more information that provides better context and depth to what actually happened.
>
> * * *
>
> The problem is this video inflamed people who said, "How disrespectful of this young man

> and the students." There was a report that the students were chanting "build the wall."
>
> The problem is there was another video nearly two hours in length, most of which we have seen. And the context it provides suggests that the story is not as originally reported.
>
> We never heard the students saying, "Build that wall." What we heard was a chant among the students that appeared to be a sports chant, right? High school students chanting as they were standing in front of this man who was beating his drum.

Native American man seen in viral video of confrontation speaks out, CBS NEWS (Jan. 20, 2019), https://www.cbsnews.com/video/native-american-man-seen-in-viral-video-of-confrontation-speaks-out/.

> He then interviewed Phillips, who stated:
>
> [Sandmann] just stood in front of me, and when the others were moving aside and letting me go, he decided that he wasn't going to do that. You know, I tried to, when I was coming up the steps, I seen [sic] him start putting himself in front of me, so I slided [sic] to the right, and he slided [sic] to the right. I slided [sic] to the left and he slided [sic] to the left—so by the time I got up to him, we were right in front of him. He just positioned himself to make sure that he aligned himself with me, so that sort of stopped my exit.

Id. (This will be called the "sliding statement" for ease of reference.) Phillips claimed that the interaction lasted about three minutes and it ended when Sandmann walked away. As the interview concluded, the anchor stated that Sandmann would likely "be disciplined" after returning to school; Phillips said he thought the chaperones were responsible for the incident and that he wanted Sandmann to "forgive himself," which the anchor repeated and said was "a very powerful statement." *Id.* After the interview with Phillips ended, the anchor reiterated that the original story was incomplete, the students might be "disciplined, possibly even expelled," and that Phillips inserted himself in the group of students to try to defuse tensions with the Black Hebrew Israelites. *Id.*

2.

CBS also published an article the same day with the headline "Native American veteran in viral video of confrontation speaks out." The article opened with Phillips's statement that he "inserted himself between the students and a small group of African American protesters, known as the [B]lack Hebrew Israelites, to diffuse [sic] the situation." It then included a portion of Sandmann's statement asserting that the students performed school chants in response to the Black Hebrew Israelites and noted that, according to Sandmann, he "didn't speak to Phillips, nor did anyone block [Phillips's] path." Next, the article quoted Phillips's sliding statement and noted that Phillips thought the chaperones were responsible for the event.

It then noted that "[t]he Diocese of Covington and Covington Catholic High School said the incident is being investigated and they would 'take appropriate action, up to and including expulsion.' " The article concluded with Phillips's statement that he hoped Sandmann could forgive himself.

D.

Sandmann alleges that nine articles published by affiliates of Gannett Co., Inc., were defamatory: two print and three online articles by The Cincinnati Enquirer, one print and one online article by The Detroit Free Press, and a single online article each by The Louisville Courier-Journal and The Tennessean.

1.

The first online article by The Cincinnati Enquirer was published on January 19, 2019, and updated on January 20, 2019, with the headline "NKY Catholic school faces backlash after video of incident at Indigenous Peoples March surfaces." The article began by stating that the students "surrounded, intimidated and chanted over Native Americans" during the confrontation. It then noted that Sandmann "stood nearby [Phillips] and stared at him" during the incident, before including part of Sandmann's statement asserting that he "never interacted with" Phillips and that "by remaining motionless and calm, [Sandmann believed he] was helping to diffuse [sic] the situation."

After this opening, the article stated, "Phillips initially approached the students in an attempt to defuse the situation." "But he was quickly swarmed." The article then quoted the Washington Post statement, which was immediately followed by part of Sandmann's statement saying he did not block Phillips. Following these statements, the article quoted Phillips's false claim that students chanted "build that wall."

It then included part of the Diocese of Covington's statement apologizing to Phillips and saying that it would investigate and potentially expel the students. Next, the article mentioned President Trump's then-recent tweet about the Wounded Knee Massacre and the Battle of Little Bighorn and concluded with a lengthy discussion of reactions to the incident on social media, which all unflinchingly criticized Sandmann and the other students. This included a reaction from a Mohawk tribe member noting that Phillips "has been the target of racial animosity in the past."

2.

The second online article by The Cincinnati Enquirer was published on January 20, 2019, and was essentially identical to the first print article by The Cincinnati Enquirer, published four days later on January 24, 2019. The print article's headline was "Video being analyzed from incident in Washington, DC," and the online headline was "Analysis: What the video from the incident at the Indigenous Peoples March tell us about what happened."

The online version[6] began by stating that videos of the standoff had "sparked intense debate" and noting that "The Enquirer has reviewed video, shot from different angles, and paired it with interviews and other information to help bring clarity to what transpired." The article characterized Phillips as "the indigenous man surrounded by students in the video that sparked the outcry" and linked to Sandmann's statement. It then addressed videos of the event, explaining that "[t]he initial video" showed Sandmann "in a 'Make America Great Again' hat, standing very close to and staring at Phillips while Phillips played the drum and chanted," while "[t]hey were surrounded by a larger group of students whose chants drowned out" Phillips. But then the article noted that the "[initial] video alone only tells part of the story" because additional video showed the prior interaction between the students and the Black Hebrew Israelites.

Phillips was then quoted, explaining that he approached the students because they were "attacking" the Black Hebrew Israelites. The article immediately refuted that claim: "[n]one of the videos show students attacking the Black Hebrew Israelites." Turning to the confrontation itself, the article stated that "the crowd of students" "circled [Phillips] and began clapping and cheering" as Sandmann "stood in front of Phillips with a smirk on his face, . . . [with the two] nearly touching as Phillips sang and beat his drum." Part of the Washington Post statement was then included, which was

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[6] In this and similar situations, I will focus on the online articles to avoid unnecessary repetition.

immediately followed by Sandmann's statement that he did not block or interact with Phillips. The article then stated that the crowd began to separate after Sandmann walked away. It concluded by noting some final interactions between the students and the Black Hebrew Israelites.

3.

The third online article by The Cincinnati Enquirer was published on January 24, 2019, and its corresponding second print article was published the next day. The print headline was "I still have forgiveness in my heart," and the online headline was "Nathan Phillips on 'Today' show: 'I still have forgiveness in my heart.'"

These articles related to an interview Phillips gave on the Today Show the day after Sandmann's corresponding Today Show interview. The online article began by stating that Phillips approached the students to defuse the situation with the Black Hebrew Israelites before noting that, despite his anger at the event, he would forgive the students. After this introduction, the article stated that Phillips believed Sandmann should apologize; continued to claim that the students chanted "build that wall"; and explained that he was "trying" to walk away from the confrontation but that Sandmann "stood in his way." The article continued by stating that Phillips "felt that [Sandmann's] statement was coached and lacked sincerity and responsibility," and quoted Phillips as saying that he "believe[d] there

[were] intentional falsehoods in his testimony," although it is unclear whether this refers to Sandmann's statement or his appearance on the Today Show. The article next cited Sandmann's Today Show statement that he was "not sorry for standing in front of Phillips, with what some have characterized as a smirk on his face." It concluded by quoting Phillips saying that Sandmann "needs to put out a different statement" because he "didn't accept any responsibility."

4.

The Detroit Free Press published an online article on January 24, 2019, and an essentially identical print version the next day. The online article's headline was "Nathan Phillips on 'Today' show: Student's explanation felt insincere"; the print headline was "Phillips on 'Today' show: Student seemed insincere."

These articles were about Phillips's interview with the Today Show. Before addressing the encounter, the online article noted that Sandmann's interview "upset" Phillips. It explained that Phillips approached the students following their interaction with the Black Hebrew Israelites and that he "described [that] encounter as threatening." The article stated that, "[w]hile Sandmann said he wished . . . the students had walked away, Phillips explained he tried to walk away and was blocked." After explaining Phillips's version of how he was blocked in more detail, the article concluded by stating that, "although [Phillips] is upset about the

issue, he has forgiveness for the students and even the chaperones who were there."

5.

The Louisville Courier-Journal article was published on January 19, 2019, and was primarily about a reaction from Stormy Daniels to the incident.[7] Headlined "Stormy Daniels calls out 'disgusting punks' from Covington Catholic," the article reported:

> Daniels weighed in Saturday on the incident involving Covington Catholic High students after video surfaced showing a young man in a "Make America Great Again" cap trying to intimidate a Native American elder. Dozens of Covington students can be seen jeering and chanting along.
>
> "I'm suddenly in favor of building a wall . . . around Covington Catholic High in KY," wrote Daniels, legally known as Stephanie Clifford, on Twitter. "And let's electrify it to keep those disgusting punks from getting loose and creating more vileness in society."

The article then noted that the Diocese of Covington "condemned the actions of the students against" Phillips "after millions of people viewed videos of incident [sic], many expressing their outrage on social media." It concluded with the Washington Post statement.

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[7] Stormy Daniels is a former adult film actress who alleges that she had an affair with Donald Trump sixteen years ago.

6.

The Tennessean article was published on January 30, 2019, with the headline "Covington school kids intimidated Native Americans. Who taught them that? | Opinion," and the subheading "The confrontation between Covington Catholic High School students and a Native American elder exposed ignorance and blatant racism."

The article criticized the students, calling them a "mob" of "young villains" who engaged in "loathsome conduct" when they "shout[ed] and chant[ed] at Phillips" and performed "racist, mock Indian dances." It also specifically targeted Sandmann, editorializing that he had "a disgusting smirk" during the confrontation. Sandmann, according to an eyewitness, "refused to let [the Native American protesters] pass" while they were, in the article's eyes, "surrounded by a sea of white youth." The article stated people must "disbelieve their own eyes" and be "blinded by racism" to "defen[d] the indefensible"—meaning Sandmann's actions. It concluded by stating that, "If anything, perhaps this episode will help to expose and root out that bevy of racism that is Covington Catholic. This school is emblematic of the social malignancy that is a festering sore on the body politic of America."

E.

The Rolling Stone, LLC, article was published on January 22, 2019, with the headline "Trump Comes to the Rescue of the MAGA Teens" and the subheading

"Right-wing media is using confusion over what exactly happened to paint the Covington Catholic teenagers as victims."

The article described the confrontation as Sandmann "standing face-to-face with Phillips" amid "a rowdy group of students" who were "taunt[ing]" Phillips. It then noted that, after Sandmann released his statement, "[t]he media ate it up, walking back previous headlines in deference to the narrative put forth by Sandmann." Next, the article focused on President Trump's response to the event and its media coverage before paraphrasing Sandmann's statement and his claim that Phillips approached him; the article did not mention Sandmann's assertion that he did not see anyone block Phillips. The article then stated that Phillips "disputed Sandmann's account, as have other videos of the incident showing Covington students circled around Phillips, who said he felt threatened." Phillips's Washington Post statement was then quoted, before the article stated that the videos "show a bunch of teens in #MAGA gear aggressively mocking a Native American" and criticized the "[r]ight-wing media" for siding with the students in the incident, which it hypothesized was because the students were "predominantly white." The article then included three tweets critical of sympathy toward Sandmann and the other students before concluding by saying the students would hopefully "live to regret their behavior," but that this was unlikely in "Trump's America."

II.

Sandmann filed separate—but substantially similar—complaints against defendants the New York Times, ABC, CBS, Gannett, Rolling Stone, and their affiliates. He alleged that defendants defamed him by falsely reporting that he blocked Phillips's ascension to the Lincoln Memorial and prevented Phillips from retreating from the encounter. In addition, Sandmann's complaint against CBS included a claim that CBS falsely reported that Sandmann impeded Phillips's movements by stepping to his left and stepping to his right. The district court granted summary judgment in defendants' favor, ruling that all the news articles were opinion, not statements of fact, and therefore exempt from the laws of defamation. Sandmann has appealed.[8]

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[8] Three additional issues raised in this appeal are without merit. First, I agree with the majority opinion that the law-of-the-case doctrine does not apply. Second, although not addressed by the majority, the statute of limitations does not bar Sandmann's claims because it was tolled while Sandmann was a minor. *See* Ky. Rev. Stat. Ann. § 413.140(1)(d); Ky. Rev. Stat. Ann. § 413.170(1); *Fann v. McGuffey*, 534 S.W.2d 770, 778 (Ky. 1975); *Hammers v. Plunk*, 374 S.W.3d 324, 331 (Ky. Ct. App. 2011) (en banc). Finally, the eighteen videos of the incident demonstrate defendants' reporting was not true, and the truth of the incident is too integral to the videos for the substantially true doctrine to apply. *See Ky. Kingdom Amusement Co. v. Belo Ky., Inc.*, 179 S.W.3d 785, 791-92 (Ky. 2005); *Bell v. Courier-J. & Louisville Times Co.*, 402 S.W.2d 84, 87 (Ky. 1966).

III.

Sandmann argues that the blocking, retreating, and sliding statements were objectively verifiable and, therefore, factual statements capable of defamatory meaning. I agree.

We review de novo the district court's grant of summary judgment. *Wilmington Tr. Co. v. AEP Generating Co.*, 859 F.3d 365, 370 (6th Cir. 2017). Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We view the record in the light most favorable to the nonmovant. *Wilmington Tr. Co.*, 859 F.3d at 370. Furthermore, where there is "undisputed video evidence," such evidence can be used to disregard other statements that are "blatantly and demonstrably false." *Boykin v. Family Dollar Stores of Mich., LLC*, 3 F.4th 832, 842 (6th Cir. 2021).

"[S]tatements that cannot reasonably be interpreted as stating actual facts about an individual" are statements of opinion, not fact, and are exempt from the laws of defamation. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (internal quotation marks and brackets omitted). The use "of loose, figurative, or hyperbolic language . . . [can] negate the impression that the writer was seriously maintaining" a factual assertion, as can an article's "general tenor." *Id.* at 21. "Put differently, a viable defamation claim exists only where a reasonable factfinder could conclude that the challenged statement connotes actual, objectively

verifiable facts." *Compuware Corp. v. Moody's Inv. Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007); *see also Milkovich*, 497 U.S. at 21 (statement that the plaintiff committed perjury was not opinion because it was "sufficiently factual to be susceptible of being proved true or false" based on "objective evidence").

Under Kentucky law, "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion." *Yancey v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1989) (quoting Restatement (Second) of Torts § 566 (1977)). While "[p]ure opinion" is "absolutely privileged," a mixed fact-and-opinion statement is not, as long as the statement "may reasonably be understood to imply the assertion of undisclosed facts which may justify the expressed opinion about the undisclosed facts." *Id.* (citation omitted). By contrast, factual statements are always capable of defamatory meaning. *See id.* at 857-58. We must consider the statements in "context" and construe them "as a whole" when considering whether they are facts or opinions. *Id.* at 857 (citation omitted).

Caselaw establishes a few helpful guideposts for this fact-intensive analysis. For example, a statement couched in qualifying terms suggests that it is an opinion. *See Williams v. Blackwell*, 487 S.W.3d 451, 453, 455-56 (Ky. Ct. App. 2016) (holding that the statements "it appears that the current reimbursement policy is excessive and a poor use of public funds" and "the possible profit that the Sheriff received from managing his

office vehicle fleet could be interpreted to be in excess of his statutory maximum salary limit" are opinions). Meanwhile, some statements are so subjective that they need not be couched in such terms to be opinion statements. *See Cromity v. Meiners*, 494 S.W.3d 499, 503-04 (Ky. Ct. App. 2015) (concluding that statements alleging that "[the plaintiff] is a liar" was an opinion); *Biber v. Duplicator Sales & Serv., Inc.*, 155 S.W.3d 732, 737-38 (Ky. Ct. App. 2004) (saying that the plaintiff's conduct "was throwing up red flags," an employee for the defendant "felt like he had been conned by the world's greatest con man," and the company "would be straightened out as soon as we get rid of" the plaintiff were all opinions (internal quotation marks omitted)).

That a third party (Phillips) made the statements also does not shield defendants from liability for its reporting. The Kentucky Supreme Court has rejected the neutral reportage doctrine—which would grant defamation immunity to publishers for reprinting "newsworthy statements." *McCall v. Courier-J. & Louisville Times Co.*, 623 S.W.2d 882, 886-87 (Ky. 1981) (per curiam) (quotation marks omitted). Even though Phillips—a non-party in this litigation—made the "blocking," "retreating," and "sliding" statements, defendants may be liable for republishing those false statements.

These cases are commonsense applications of a simple question: are the statements objectively verifiable? Reading fairly the blocking, retreating, and sliding statements leads to an unequivocal "yes." Begin and end by reviewing the videos. The videos show that,

while Nicholas Sandmann was standing still, Phillips walked up to him, played his drum, and sang inches from Sandmann's face. The 16-year-old's only reaction to this unexpected approach by an adult whom he did not know was to smile. During the roughly six-minute encounter initiated by Phillips, a gap in the crowd developed through which Phillips could have walked past or away from Sandmann had he chosen to do so. Phillips did not do so; instead, he remained where he chose to confront the 16-year-old boy only inches from his face.

Next, consider what the statements are about: the physical positioning of Phillips and Sandmann. Then ask whether physical positioning is objectively verifiable. It certainly is. And here, the video evidence conclusively demonstrates that Phillips's narrative is indeed "blatantly and demonstrably false." *Boykin*, 3 F.4th at 842.

The majority opinion holds that the blocking, retreating, and sliding statements were likely Phillips's subjective impressions of Sandmann's intent. Such speculation is contrary to the text of the news stories, which do not state that they are reports of Phillips's *perception* of Sandmann's *intent*.

These are three statements that the majority holds are opinion:

1. "I started going that way, and that guy in the hat [Sandmann] stood in my way and we were at an impasse. . . ."

2. "He [Sandmann] just blocked my way and wouldn't allow me to retreat."

3. "I seen [sic] him start putting himself in front of me, so I slided [sic] to the right, and he slided [sic] to the right. I slided [sic] to the left and he slided [sic] to the left—so by the time I got up to him, we were right in front of him. He just positioned himself to make sure that he aligned himself with me, so that sort of stopped my exit."

Rather than construing the text of these statements with their plain meaning, the majority rewrites these news articles as if defendants had reported that Phillips *perceived* that Sandmann *intended* to block his way, *intended* to prevent his retreat, and *intended* to slide to his left and right. The majority's creative journalism is apparently based on its inference that defendants meant to report that Phillips was recounting his perceptions of Sandmann's intentions.

In the words of the majority opinion, "Phillips felt that he [Sandmann] was 'blocking' him and not 'allowing' his retreat. There is no way to determine what Sandmann's intent was from the videos of the encounter, which approximate the information available when Phillips made the blocking statements." However, contrary to the majority's rewrite, the articles do not report Phillips's feelings or perceptions. Rather, the articles report a factual encounter as recited by Phillips.

Similarly, the majority rewrites the reporting of Sandmann's actions of sliding to the right and sliding to the left as Phillips's perception of Sandmann's intent. ("Here, too, Phillips ascribed subjective intent to Sandmann's conduct."). Again, the news stories do not cabin their factual recitations as being Phillips's perceptions or feelings.

In my view, the inferences created by the majority are not reasonable and are inconsistent with the plain wording of the text of defendants' news reports. Moreover, such inferences are contrary to our summary judgment rule that provides that all reasonable inferences must be construed in favor of the nonmoving party—Sandmann—not in favor of the moving party—defendants. *Wilmington Tr. Co.*, 859 F.3d at 370. The majority's divergent approach—reading inferences into Phillips's statements—wrongly views the record evidence on summary judgment in defendants' favor.

When describing Sandmann's physical actions, Phillips never used qualifying terms like "I think" or "it seemed" or "I felt" that would have suggested he was relaying his perceptions, feelings, or opinions. *Cf. Blackwell*, 487 S.W.3d at 453, 455-56. Instead, he recited, and defendants reported, a straightforward factual account of events: Phillips approached Sandmann; thereafter Sandmann moved to his left and his right, blocked him, and prevented his retreat. Whether Sandmann did so is objectively verifiable.

The majority's further reliance on distinguishable and nonbinding caselaw is not persuasive. For

example, in *Macineirghe v. County of Suffolk*, a district court ruled that a defendant's statement that a man "blocked" a police car to prevent it from pursuing a fleeing suspect was an opinion. No. 13-cv-1512, 2015 WL 4459456, at *13-14 (E.D.N.Y. July 21, 2015). But that court never addressed whether that statement was objectively verifiable and, therefore, did not engage with the analysis at issue here. *Id.* at *10, 13-15. Similarly unhelpful is our unpublished opinion in *Croce v. Sanders*, 843 F. App'x 710 (6th Cir. 2021). At issue there were statements about whether the plaintiff had engaged in dishonest research. *Id.* at 712-13. But honesty is determined by an inherently subjective value judgment, not an objective factual inquiry like physical positioning. The statements in *Croce* are fundamentally different from those here. Neither case engaged in a materially similar fact-versus-opinion analysis as we have here, so neither is persuasive nor applicable.

In sum, facts matter. The video evidence shows that Phillips initiated an encounter with a 16-year-old boy. In response to this action from a stranger, Nicholas Sandmann did nothing more than stand still and smile. At bottom, the blocking, retreating, and sliding statements reported by defendants were "sufficiently factual to be susceptible of being proved true or false" based on "objective evidence," *Milkovich*, 497 U.S. at 21, and thus statements of fact. Moreover, the statements were *not* qualified to the effect that they were Phillips's perceptions of Sandmann's intent. On the contrary, the text of the statements reported by defendants were that Sandmann had so acted.

IV.

For these reasons, I respectfully dissent. I would reverse the grant of summary judgment and remand for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 22-5734/5735/5736/5737/5738

NICHOLAS SANDMANN,

Plaintiff-Appellant,

v.

NEW YORK TIMES COMPANY (22-5734); CBS NEWS, INCORPORATED, VIACOMCBS, INCORPORATED, and CBS INTERACTIVE, INCORPORATED (22-5735); ABC NEWS, INC., ABC NEWS INTERACTIVE, INCORPORATED, and WALT DISNEY COMPANY (225736); ROLLING STONE, LLC and PENSKE MEDIA CORPORATION (22-5737); GANNETT COMPANY, INC. and GANNETT SATELLITE INFORMATION NETWORK, LLC (22-5738),

Defendants-Appellees.

Before: GRIFFIN, STRANCH,
and DAVIS, Circuit Judges.

JUDGMENT

(Filed Aug. 16, 2023)

On Appeal from the United States District Court
for the Eastern District of Kentucky at Covington.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

Nos. 22-5734, 22-2735, 22-5736, 22-5737, 22-5736

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NICHOLAS SANDMAN Plaintiff-Appellant, v. NEW YORK TIMES COMPANY (22-5734) CBS NEWS, INCORPORATED (22-5735) ABC NEWS, *et al* (22-5736) ROLLING STONE, *et al* (22-5737) GANNETT COMPANY, *et al* (22-5738) Defendants-Appellees.	)	**ORDER** (Filed Oct. 12, 2022)

The appellees in these cases, with the consent of the appellant, move to consolidate briefing, oral argument, and disposition, to expand the word limits for the consolidated briefs, and to suggest an agreed briefing schedule. Based on the parties' agreement, and the efficiency realized by the consolidation of briefing and submission,

It is hereby **ORDERED** that the motions are **GRANTED** insofar as the matters are consolidated for briefing and submission as follows: The appellant's brief of no more than 15,000 words shall be filed on all cases no later than October 17, 2022; the appellees'

joint brief of no more than 15,000 words addressing issues common to all appellees shall be filed on all cases no later than December 16, 2022; each appellee (or, where applicable, group of appellees within the same case) may also file a brief addressing issues unique to them of no more than 4,000 words no later than December 16, 2022; and the appellant's reply brief, if any, of no more than 4,000 words shall be filed no later than January 23, 2023. The merits panel retains the discretion to consolidate any oral argument and the structure thereof as well as the disposition of the cases.

ENTERED PURSUANT TO RULE 45(a)
RULES OF THE SIXTH CIRCUIT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

Issued: October 12, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION

CIVIL ACTION NO. 2:20CV23 (WOB)

NICHOLAS SANDMANN PLAINTIFF

VS.

THE NEW YORK TIMES CO. DEFENDANT

MEMORANDUM OPINION AND ORDER

(Filed Oct. 1, 2020)

This matter is before the Court on defendant's motion to dismiss for failure to state a claim on which relief may be granted. (Doc. 18). The Court has reviewed this matter and concludes that oral argument is unnecessary.

Introduction

The Complaint is based on the defendant's news coverage of an event that occurred on January 18, 2019, during a visit by plaintiff Nicholas Sandmann and his fellow Covington Catholic High School students to Washington, D.C.

Greatly summarized, the Complaint alleges that Sandmann was libeled by the defendant when it published a news article stating that Sandmann, while at the Lincoln Memorial, "blocked" Native-American activist Nathan Phillips and "prevented Phillips' retreat while Nicholas and a mass of other young white boys

surrounded, taunted, jeered and physically intimidated Phillips." (Compl. ¶ 3).

This news story is alleged to be false and defamatory. (*Id.*). Sandmann further alleges that this publication by defendant and similar stories by other news media caused him to be harassed by the public, causing him great emotional distress. (Compl. 25, 162-164, 251-257). Sandmann also alleges that defendant's article "is now forever a part of the historical Internet record and will haunt and taint Nicholas for the remainder of his natural life and impugn his reputation for generations to come." (Compl. ¶ 254).

The motion to dismiss argues that this publication is not libelous, but the Court has ruled in companion cases that it is libelous. The Court continues to hold that opinion for the reason stated in such preceding cases. *See Sandmann v. The Washington Post*, Cov. Case No. 19cv19 (Docs. 47, 64); *Sandmann v. Cable News Network*, Cov. Case No. 19cv31 (Docs. 43, 44); *Sandmann v. NBCUniversal Media, LLC*, Cov. Case No. 19cv56 (Doc. 43).

Analysis

1. <u>Failure to State a Claim</u>

As in other cases, the Complaint herein alleges that the defendant's article quoted the following statement by Phillips:

> It was getting ugly, and I was thinking: I've got to find myself an exit out of this situation

> and finish my song at the Lincoln Memorial, Mr. Phillips told The Post. I started going that way, and that guy in the hat stood in my way and we were at an impasse. He just blocked my way and wouldn't allow me to retreat.

(Compl. ¶ 206). The Complaint alleges that this statement was false in that Sandmann did not block Phillips or interfere with him in any way, and that it conveys a defamatory meaning because it imputes to Sandmann racist conduct. (Compl. ¶ 196, 207).

The parties agree that Kentucky law applies to this case. Under Kentucky law, a writing is defamatory "if it tends to (1) bring a person into public hatred, contempt or ridicule; (2) cause him to be shunned or avoided; or (3) injure him in his business or occupation." *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981) (citation omitted). The allegations of the Complaint fit this definition precisely.

The Complaint further alleges that the libel was the proximate result of defendant's negligence, recklessness, and actual malice. (Compl. ¶¶ 221-250).

In its motion to dismiss, defendant cites *Croce v. The New York Times Co.*, 930 F.3d 787 (6th Cir. 2019). That case involves Ohio, rather than Kentucky, law. But even if it were binding on this Court, it is not on point.

In *Croce*, a newspaper published an article that included unflattering allegations against the plaintiff, a university professor and cancer researcher. The Court

held that, in "full context," a "reasonable reader would interpret the article as a standard piece of investigative journalism" which simply reported "newsworthy allegations with appropriate qualifying language." *Id.* at 794-95.

That holding is inapplicable under the allegations of the Complaint here. Defendant published a statement by Phillips that was made after Sandmann had departed for home, a statement to which Sandmann had no opportunity to reply in real time. While Sandmann had such an opportunity later, and such evidence might be admissible to show lack of malice, it is not a defense to the defamatory meaning of Phillips' original statement itself.

Therefore, the Court holds that the Complaint states a claim for relief.

2. <u>Statute of Limitations</u>

Defendant also asserts that Sandmann's claim is barred by the statute of limitations because it was filed on March 2, 2020, more than one year after the relevant events occurred on January 18, 2019.

Of course, Sandmann was 16 years old at the time of these events. And, under KRS 413.170(a), the running of a statute of limitations is tolled where the plaintiff is a minor, until he or she reaches the age of 18. Thus, Sandmann had one year following his eighteenth birthday, which occurred in July 2020, to file his claim.

Defendant argues, however, that the statute of limitations began to run when Sandmann filed his first defamation suit through his parents as his next friends on February 19, 2019, relying on an unpublished opinion of the Kentucky Court of Appeals. *See Tallman v. City of Elizabethtown*, No. 2006-CA-002542, 2007 WL 3227599 (Ky. Ct. App. Nov. 2, 2007).

In *Tallman*, the Court held that the statute of limitations began to run against minor children when they were represented by their mother on related claims in prior litigation in federal court. *Id.* at *3. A reading of that decision, however, reveals that the Court considered the litigation before it to be highly unusual, and it noted that its ruling was made in light of "the procedural history of the case." *Id.* No such history exists here.

Moreover, the Court does not believe that the Kentucky Supreme Court would agree with *Tallman*. *Tallman* cites no authority for its holding, which conflicts with the plain language of the savings statute itself. The statute makes no exception to the tolling of the limitations period for claims by a minor until he reaches the age of majority. *See Bradford v. Bracken County*, 767 F. Supp.2d 740, 752 (E.D. Ky. 2011) (refusing to apply *Tallman* to bar plaintiff's claim, finding that Kentucky Supreme Court would not adopt its reasoning because it would add exception to statute that legislature did not provide); *T.S. v. Doe*, Civil Action 9 No. 5:10-CV-217, 2010 WL 3941868, at *4 (E.D. Ky. Oct. 6 2010) (similar).

Therefore, defendant's statute of limitations defense is without merit.

Thus, having reviewed this matter, and the Court being advised,

IT IS ORDERED that defendant's motion to dismiss (Doc. 18) be, and is hereby, **DENIED**.

This 1st day of October 2020.

[SEAL] **Signed By:**
William O. Bertelsman /s/ WOB
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION

CIVIL ACTION NO. 2:20CV23 (WOB)

NICHOLAS SANDMANN **PLAINTIFF**

VS.

THE NEW YORK TIMES CO. **DEFENDANT**

JUDGMENT

(Filed Jul. 26, 2022)

Pursuant to the Opinion and Order entered concurrently herewith,

IT IS ORDERED AND ADJUDGED that judgment be, and is hereby, **ENTERED IN DEFENDANT'S FAVOR**. This matter is hereby **STRICKEN** from the docket of this Court.

This 26th day of July 2022.

[SEAL] **Signed By:**
William O. Bertelsman /s/ WOB
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION

CIVIL ACTION NO. 2:20CV23 (WOB)

NICHOLAS SANDMANN **PLAINTIFF**

VS.

THE NEW YORK TIMES CO. **DEFENDANT**

– –

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION

CIVIL ACTION NO. 2:20CV24 (WOB)

NICHOLAS SANDMANN **PLAINTIFF**

VS.

CBS NEWS, INC., ET AL. **DEFENDANTS**

– –

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION

CIVIL ACTION NO. 2:20CV25 (WOB)

NICHOLAS SANDMANN **PLAINTIFF**

VS.

ABC NEWS, INC., ET AL. **DEFENDANTS**

– –

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION

CIVIL ACTION NO. 2:20CV26 (WOB)

NICHOLAS SANDMANN **PLAINTIFF**

VS.

GANNETT CO., INC. **DEFENDANT**

– –

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION

CIVIL ACTION NO. 2:20CV27 (WOB)

NICHOLAS SANDMANN **PLAINTIFF**

VS.

ROLLING STONE, LLC, ET AL. **DEFENDANTS**

– –

OPINION AND ORDER

(Filed Jul. 26, 2022)

These five libel cases arise out of events that occurred in Washington, D.C. on January 18, 2019 and the ensuing extensive media coverage of plaintiff Nicholas Sandmann's encounter with Nathan Phillips.

The cases are now before the Court on motions filed in all five pending cases: plaintiff's motions for partial summary judgment on the issue of falsity[1];

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[1] *Sandmann v. New York Times*, No. 20cv23 (Doc. 52); *Sandmann v. CBS News*, No. 20cv24 (Doc. 58); *Sandmann v. ABC News,*

defendants' joint motion for summary judgment[2]; defendants' supplemental memoranda in support of summary judgment[3]; and defendants' motions to strike[4].

Factual and Procedural Background

The Court has previously set forth the general factual background of these cases, and this Opinion assumes the reader's familiarity therewith. *See* Case No. 20cv23, Doc. 27; Case No. 20cv24, Doc. 33; Case No. 20cv25, Doc. 36; Case No. 20cv26, Doc. 39; Case No. 20cv27, Doc. 35. For purposes of the present motions, however, some review of the procedural history of these and related cases is warranted.

The first case filed by Nicholas Sandmann against media defendants based on their coverage of the encounter between Sandmann and Phillips was *Sandmann v. The Washington Post*, Case No. 19cv19, which was filed in this Court on February 19, 2019.

Inc., No. 20cv25 (Doc. 64); *Sandmann v. Gannett Co., Inc.*, No. 20cv26 (Doc. 65); *Sandmann v. Rolling Stone, LLC* (Doc. 59).

[2] *Sandmann v. New York Times*, No. 20cv23 (Doc. 53); *Sandmann v. CBS News*, No. 20cv24 (Doc. 59); *Sandmann v. ABC News, Inc.*, No. 20cv25 (Doc. 65); *Sandmann v. Gannett Co., Inc.*, No. 20cv26 (Doc. 66); *Sandmann v. Rolling Stone, LLC* (Doc. 60).

[3] *Sandmann v. New York Times*, No. 20cv23 (Doc. 54); *Sandmann v. CBS News*, No. 20cv24 (Doc. 60); *Sandmann v. ABC News, Inc.*, No. 20cv25 (Doc. 66); *Sandmann v. Gannett Co., Inc.*, No. 20cv26 (Doc. 67); *Sandmann v. Rolling Stone, LLC* (Doc. 61).

[4] *Sandmann v. New York Times*, No. 20cv23 (Doc. 64); *Sandmann v. CBS News*, No. 20cv24 (Doc. 72); *Sandmann v. ABC News, Inc.*, No. 20cv25 (Doc. 78); *Sandmann v. Gannett Co., Inc.*, No. 20cv26 (Doc. 78); *Sandmann v. Rolling Stone, LLC* (Doc. 72).

Sandmann alleged that The Post defamed him by publishing seven articles and three Tweets containing a total of thirty-three allegedly libelous statements.

Sandmann filed similar complaints against Cable News Network, Inc. ("CNN") and NBCUniversal Media, LLC ("NBC") on March 31, 2019 and May 1, 2019, respectively. (Case Nos. 19cv31 and 19cv56).

The Post filed an early motion to dismiss which the Court granted, after oral argument, in an opinion issued on July 26, 2019. (Case No. 19cv19, Doc. 47). In that opinion, the Court held that none of the statements were actionable for various reasons: some were not "about" Sandmann; some were statements of opinion; and/or some were not subject to a defamatory meaning. (*Id.*).

Sandmann filed a motion for reconsideration and a motion for leave to file an amended complaint. After oral argument, the Court entered an order on October 28, 2019, partially granting the motion to reconsider and allowing Sandmann to amend his complaint. (Case No. 19cv19, Doc. 64). The Court's ruling was narrow, however. It allowed only one group of statements to proceed as a basis for the defamation claim: Phillips's statements that Sandmann had "blocked" Phillips and "would not allow him to retreat." *Id.* at 2.

The Court stated that justice required that discovery be conducted as to the context of those statements, noting that the "Court will then consider them anew on summary judgment." (*Id.*). The Court reiterated this point at the end of its order, stating that while the

allegations of the amended complaint passed the requirement of "plausibility," they would be subject to summary judgment practice after discovery. (*Id.* at 3).[5]

The Court called the three pending cases for a scheduling conference in January 2020. During that conference, counsel informed the Court that Sandmann and CNN had settled, and that Sandmann intended to file additional suits against other media defendants. *See* Case No. 19cv19, Doc. 72. With the parties' agreement, the Court thus deferred completion of a discovery plan until the new suits were filed and any preliminary motions resolved. *Id.*

The five cases now pending before the Court were all filed on March 2, 2020. However, the onset of the COVID-19 pandemic, changes in Sandmann's representation, and resolution of Rule 12 motions in the newly filed cases slowed the progress of these matters until early 2021.[6]

In March 2021, the Court adopted the parties' proposed "phased" discovery plan in all cases, with "Phase 1" being "limited to the facts pertaining to the encounter between Plaintiff and Mr. Phillips." (Case No.

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[5] The Court made similar rulings in the CNN and NBC Cases. *See* Case No. 19cv31, Doc. 43, Case No. 19cv56, Doc. 43.

[6] The Court denied motions to dismiss in the five new cases consistent with its rulings in the first three cases. *See* Case No. 20cv23, Doc. 27; Case No. 20cv24, Doc. 33; Case No. 20cv25, Doc. 36; Case No. 20cv26, Doc. 39; Case No. 20cv27, Doc. 35).

20cv23, Doc. 36 at 2).[7] The parties' joint planning report explained:

> **Plaintiff's case against each Defendant then would be ripe for an early motion for summary judgment [on] whether Nathan Phillips' statements that Plaintiff "blocked" him or "prevented him from retreating" (the "Blocking Statements") are true or substantially true or otherwise not actionable based on the undisputed facts developed during initial discovery and the issues defined in the Court's prior decisions.**
>
> The limited scope of Phase 1 discovery would allow the parties to present summary judgment arguments to the Court without engaging in the costly expensive discovery that many of the legal issues in this case would require.
>
> . . .
>
> The parties agree that phased discovery is the best way to focus the resources of the parties and limit the burdens on the Court. **Most importantly, it will permit this Court to rule at an earlier stage on the threshold issues discussed above.**

(*Id.* at 2-3) (emphasis added).

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[7] By then, both The Post and CNN had settled with Sandmann. Sandmann and NBC settled at the end of 2021.

Although Phase 1 discovery has been completed, the only evidence filed in the record consists of: (1) Sandmann's deposition; (2) a declaration under oath by Phillips; (3) seven declarations under oath by persons in attendance at the incident; and (4) a collection of video recordings taken at the National Mall that day. This evidence will be briefly summarized.

A. Sandmann's Deposition

Although lengthy, Sandmann's deposition contains relatively little testimony pertinent to the issues at hand:

- Sandmann observed as Phillips moved toward and then through the group of students. Some students moved out of Phillips's way as he walked forward. Sandmann felt that Phillips was trying to intimidate the students by walking right up to them when he could have taken several other routes around them, so Sandmann felt like he wanted to stand up for his school. At the time, he did not know that Phillips's intent was to get up to the Lincoln Memorial;
- Phillips stood so close to Sandmann that his drum touched Sandmann's shoulder, his spit was getting on Sandmann's face, and Sandmann could smell Phillips's breath;
- The steps were icy and Sandmann was concerned that if he moved he might slip and fall.

- Sandmann felt he was being mature by remaining calm and standing his ground in a tense situation;
- Sandmann can see how Phillips might have perceived that Sandmann was trying to block his path;
- There was room for Phillips to keep walking if that is what he wanted to do. Sandmann did not feel that he was blocking Phillips because Phillips gave no indication that he wanted to move forward. Instead, he locked eyes with Sandmann when he was still several feet away from him and then "planted" himself directly in front of Sandmann. Phillips did not take even the slightest step in any direction in an attempt to move;
- Sandmann is not sure if he moved a little to the left as Phillips approached; he either adjusted his footing and/or the people around him shifted as well;
- At one point, Sandmann felt that he was blocked from moving because of the crowd around him, although he has no reason to believe that they would not have moved if he had asked them to do so.

(Sandmann Dep. 158-59, 180-84, 193, 199, 206, 218, 221, 223-25, 246-48, 263-67, 276-80, 283-84, 340).

B. Phillips's Declaration

Phillips's declaration, submitted by defendants in support of their joint motion for summary judgment, avers:

- Other than a woman named Ashley Bell, Phillips did not know any of the individuals who joined him in walking towards the group of students;
- As he approached the students, Phillips "felt that the crowd was swarming and surrounding me;"
- As Phillips began to move towards the Lincoln Memorial, students moved out of his way. However, Sandmann "appeared" to position himself in front of Phillips;
- Phillips declares: "It was very much my experience that Mr. Sandmann was blocking me from exiting the situation. It was very much my experience that he intentionally stood in my way in order to stop me from moving forward;"
- Further: "I felt surrounded in that space, and I believed Mr. Sandmann did not want to let me pass. It seemed to me that Mr. Sandmann felt that he needed to stand there and block my way."[8]

[8] The Court notes that Phillips's declaration was signed on December 11, 2021. Sandmann's deposition was taken on September 13 and 14, 2021.

C. Other Declarations

Six of the seven other declarations are by individuals who had attended the Indigenous Peoples March that day, which Phillips also attended. (Case No. 20cv23, Docs. 53-3 – 53-7). Only one, Ashley Bell, knew Phillips from prior events. There was no planning among these people in advance of the incident in question. Rather, their decision to join Phillips as he approached the group of students was an impromptu one. Five of the six individuals aver that it was their impression that Sandmann blocked Phillips from moving forward.

The seventh declaration is from a classmate of Sandmann's who was also with the group of students on the Mall. (Case No. 20cv23, Doc. 53-8). But that student had moved away from the group at the time of the encounter between Sandmann and Phillips and did not observe it directly.

D. The Videos

The parties have submitted twenty videos that capture scenes from the National Mall on the day in question. The parties have stipulated to the videos' authenticity and have waived any hearsay objections to them. (Case No. 20cv23, Doc. 53-1 at 14 n.3).

In the Court's view, six of the videos show the specific encounter between Sandmann and Phillips in helpful respects.[9] What a viewer might conclude from

[9] Videos 1, 2, 8, 9, 16, 17.

these videos is a matter of perspective. However, what is clearly shown and not subject to reasonable dispute is at least the following:

- Phillips began drumming and approaching the group of students, accompanied by several individuals who testify that, although they did not know Phillips, they followed him because he was an elder;
- As Phillips came close to the group of students, some began to part, and Phillips continued to move forward. Eventually, Phillips came to a stop directly in front of Sandmann. As Phillips approached, Sandmann subtly adjusted his footing, but it is unclear if he actually moved from where he stood.
- At no point did Phillips ask Sandmann to move or attempt to continue walking past him.
- Sandmann also did not change his position while Phillips played his drum, although it was within inches of Sandmann's face.
- The encounter ended when a chaperone arrived and told the students that their buses had arrived.

Analysis

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the

outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering the evidence in the record, the court must view the evidence "in a light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences." *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 861 (6th Cir. 2007). This Court is sitting in diversity, and thus applies Kentucky law. *Himmel v. Ford Motor Co.*, 342 F.3d 593, 598 (6th Cir. 2003).

A. Law of the Case

Sandmann first argues that the Court cannot now consider the fact-or-opinion issue because of the law of the case doctrine. This argument is without merit.

As noted above, the Court expressly held that while the allegations of Sandmann's complaints passed the "plausibility" test at the pleading stage, and that discovery should be had on the context of Phillips's statements, the actionability of the statements would be revisited on summary judgment.

Further, the Sixth Circuit has held that "the law of the case doctrine does not apply to earlier proceedings where a different legal standard governs," such as a ruling at the pleading stage and subsequent summary judgment proceedings. *In re: B & P Baird Holdings, Inc.*, 759 F. App'x 468, 477 (6th Cir. 2019) (citation omitted).

Finally, Sandmann's insistence that the Court cannot now revisit this legal issue is ironic considering that he vigorously, and successfully, moved the Court to reconsider its initial ruling in The Post case.

In sum, the law of the case doctrine does not preclude this Court from reconsidering anew on summary judgment legal issues raised at the pleading stage.

B. Fact or Opinion

1. General Principles

All parties agree that whether "a statement is fact or opinion is a question of law for the court to decide." *Croce v. Sanders*, 843 F. App'x 710, 713 (6th Cir. 2021) (citation omitted).

As the Supreme Court of the United States noted over thirty years ago in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Id.* at 20; s*ee also id.* at 21 (statement must be "sufficiently factual to be susceptible of being proved true or false"); *Compuware Corp. v. Moody's Inv'rs Servs.*, 499 F.3d 520, 529 (6th Cir. 2007) ("Put differently, a viable defamation claim exists only where a reasonable factfinder could conclude that the challenged statement connotes actual, objectively verifiable facts.").

Under Kentucky law, "alleged defamatory statements should be construed as a whole" in "the whole

context of its publication." *Yancey v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1990) (internal quotations and citation omitted). And a "publication must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it." *Id.* at 858.

The Sixth Circuit has also emphasized that it is important for the court to consider what a reasonable reader would take away from allegedly defamatory statements. A recent Sixth Circuit case, *Croce v. Sanders*, 843 F. App'x 710 (6th Cir. 2021), illustrates this principle well. The case involved a biologist who contacted the New York Times and other newspapers about statistical inaccuracies in scientific articles authored by a celebrated cancer researcher. *Id.* at 712-13. The cancer researcher sued the biologist for defamation. The Sixth Circuit held that his statement that the researcher "knowingly engag[ed] in scientific misconduct and fraud" was protected opinion. *Id.* at 715.

Judge Thapar, who authored the opinion, focused on what a reasonable reader would take away from the letter that the biologist wrote. He concluded that "reasonable readers would see there is ample room for a different interpretation of the evidence [the biologist] presented." *Id.* at 716. He further explained that "whether a set of facts amounts to misconduct" is subjective and "we would expect people to have different opinions on the question." *Id.* The biologist's statement was "neither an assertion of fact nor a conclusion that follows incontrovertibly from asserted facts as a matter of logic. It is instead a subjective take that is up for

debate." *Id.*; *see also Seaton v. TripAdvisor*, 728 F.3d 592, 598 (6th Cir. 2013) ("Readers would, instead, understand the list [of dirtiest hotels in America] to be communicating subjective opinions of travelers who use Trip Advisor."); *Macineirghe v. Cty. Of Suffolk*, 13-cv-1512, 2015 WL 4459456, at *14 (E.D.N.Y. July 21, 2015) (finding that a statement from an eyewitness who recounted the entirety of a police chase and said that he saw someone "block" a police car was opinion, and a reasonable reader would not understand his words to imply undisclosed facts).

The Supreme Court has also emphasized that the *setting* in which the speech in question is made helps make the nature of the allegedly defamatory statements more apparent to readers. For example, "[q]uotations allow the reader to form his or her own conclusions and to assess the conclusions of the author, instead of relying entirely upon the author's characterization of her subject." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991); *see also Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) (holding that when speakers at a city council meeting characterized the plaintiff's negotiating position as "blackmail," a reasonable reader would understand that it was not slander when spoken, and not libel when reported by a newspaper).

These same principles are applied across many other circuits. In sum, the Court must ask whether a reasonable reader, in reading the entire article, would understand that the statement in question is someone's opinion or interpretation of an event or situation.

See, *e.g.*, *Partington v. Bugliosi*, 56 F.3d 1147, 1156-57 (9th Cir. 1995) ("When an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment."); *Hayes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) ("If it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 729 (1st Cir. 1992) ("The sum effect of the format, tone, and entire content of the articles is to make it unmistakably clear that [the author] was expressing a point of view only.").

Finally, if an allegedly defamatory statement is a statement of opinion, it is actionable under Kentucky law "only if it implies the allegation of undisclosed defamatory facts." *Lassiter v. Lassiter*, 456 F. Supp. 2d 876, 881 (E.D. Ky. 2006) (internal quotations and citation omitted).

2. <u>The "Blocking Statements"</u>

The allegedly defamatory Blocking Statements at issue are the following:

> It was getting ugly, and I was thinking: "I've got to find myself an exit out of this situation and finish my song at the Lincoln Memorial,"

> Mr. Phillips told the Post. I started going that way, and that guy in the hat stood in my way and we were at an impasse. **He just blocked my way and wouldn't allow me to retreat.**

(*See*, *e.g.*, Case No. 20cv23, Doc. 1-7 at 3) (emphasis added).[10]

Applying the above legal authorities, and with the benefit of a more developed record, the Court concludes that Phillips's statements that Sandmann "blocked" him and "wouldn't allow [him] to retreat" are objectively unverifiable and thus unactionable opinions.

Instead, a reasonable reader would understand that Phillips was simply conveying his view of the situation. And because the reader knew from the articles that this encounter occurred at the foot of the Lincoln Memorial, he or she would know that the confrontation occurred in an expansive area such that it would be difficult to know what might constitute "blocking" another person in that setting.

Generally, "blocking" is an imprecise term capable of different meanings that "lacks a plausible method of

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[10] This citation is to the complaint against The New York Times, which quoted The Washington Post article. Some of the publications by the other four defendants differ slightly. For example, CBS's publication quoted Phillips as saying that Sandmann "positioned himself" in front of Phillips; that Sandmann "slided" to the left and right; and that Sandmann "aligned himself with me, so that sort of stopped my exit." (Case No. 20cv24, Doc. 1-7 at 3). However, the parties apply the same analysis to these statements.

verification." *Croce*, 843 F. App'x at 715 (citation omitted). In particular, because of the context in which this encounter occurred – the large, open area adjacent to the Lincoln Memorial – the blocking statement simply cannot be proven to be either true or false. Had such an encounter occurred in a small or confined area, a statement that one person was "blocked" by another might be objectively verifiable. But it is not here.

Interestingly, plaintiff's responsive memorandum to the joint motion for summary judgment argues that "blocking" is factual because "it involves the oppositional position of two human bodies ***in a confined space.***" (Case No. 20cv23, Doc. 61 at 42) (emphasis added). But, as the videos depict, the area where this encounter occurred was a huge, outdoor setting, not a confined space.

Further, Phillips's statements rely on assumptions concerning both Phillips and Sandmanns' state of mind. Yet, Phillips had no way of knowing what Sandmann was thinking or intended when he made the challenged statements.[11]

It has long been established that someone's state of mind is not capable of being proven true or false.[12]

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[11] It is undisputed that Phillips and Sandmann did not speak to each other during their standoff. Thus, Sandmann had no way of knowing that Phillips was trying to pass him to get to the Lincoln Memorial. Likewise, Phillips had no way to confirm his belief that Sandmann intended to block him and would not allow him to retreat.

[12] Sandmann's own deposition testimony illustrates the unverifiability of someone's state of mind. Sandmann was asked

Compare Riley v. Harr, 292 F.3d 282, 290 (1st Cir. 2002) ("An author who fairly describes the general events involved and offers his personal perspective about some of the ambiguities and disputed facts should not be subject to a defamation action.") *and Haynes*, 8 F.3d at 1227 ("Anyone is entitled to speculate on a person's motives from the known facts of his behavior.") *with Milkovich*, 497 U.S. at 21 (explaining that perjury is verifiable by comparing the witness's testimony at a board hearing and subsequently in court); *see also Compuware Corp.*, 499 F.3d at 529 ("A Moody's credit rating is a predictive opinion, dependent on a subjective and discretionary weighing of complex factors.").

Courts have also found important the style of writing and its context in assessing what a reasonable reader would understand the allegedly defamatory statements to mean.

For example, in *McCabe v. Rattiner*, 814 F.2d 839 (1st Cir. 1987), the owner of a time share condominium development sued a reporter who published an article

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whether it was possible "that Phillips was trying to see if you guys [Sandmann and his friend, Cameron] would both move to create a path for him to go towards what would now be where you are standing?" (Sandmann Dep. at 238:1–6). This of course required Sandmann to speculate and prompted him to answer "It's possible he was thinking that. Again, he never made that clear." (*Id.* at 238:12–13). He was then asked if this was because "he [Phillips] didn't articulate it?" (*Id.* at 238:15–16). To which he responded "Correct." (*Id.* at 238:17). Phillips's intent in that moment is not objectively verifiable, the same way Sandmann's intent in that moment is not objectively verifiable. The Court must look at the meaning of the statements when they were made, without reference to *post hoc* explanations.

in a local paper describing his encounter with the business, referring to it as a "scam." After reviewing Supreme Court libel precedent, the Court first noted that the word "scam" does not have a precise meaning but means different things to different people. *Id.* at 842. The Court further observed that first-person, narrative style statements on matters of public concern "put[] the reader on notice that the author is giving his views" and "are commonly understood to be attempts to influence the public debate." *Id.* at 843.

This latter observation applies equally to Phillips's statements. The media defendants were covering a matter of great public interest, and they reported Phillips's first-person view of what he experienced. This would put the reader on notice that Phillips was simply giving his perspective on the incident. *See also Riley*, 292 F.3d at 289 (statement expressing an interpretation, rather than claiming to be in possession of objectively verifiable facts, is nonactionable opinion).

Moreover, Phillips's statement did not imply the existence of any nondisclosed defamatory facts, and only under such circumstances does a statement of opinion lose its constitutional protection. *Yancey*, 786 S.W.2d at 857.

Therefore, in the factual context of this case, Phillips's "blocking" statements are protected opinions. This holding moots all other motions before the Court.

Conclusion

The Court allowed these cases to proceed to discovery based on the allegations of plaintiff's complaints and a belief that some development of the context of this incident may be helpful. The parties shrewdly agreed to phased discovery allowing the above legal issues to be revisited by the Court before the parties embarked on further expensive and time-consuming discovery and possibly trials, all of which would be wasted should the United States Court of Appeals for the Sixth Circuit agree with this Opinion.

And finally, the Court has reached its conclusions with fealty to the law as its primary concern, with no consideration of the rancorous political debate associated with these cases.

Therefore, having reviewed these matters, and the Court being advised,

IT IS ORDERED that:

(1) Plaintiff's motions for partial summary judgment on the issue of falsity (*Sandmann v. New York Times*, No. 20cv23 (Doc. 52); *Sandmann v. CBS News*, No. 20cv24 (Doc. 58); *Sandmann v. ABC News, Inc.*, No. 20cv25 (Doc. 64); *Sandmann v. Gannett Co., Inc.*, No. 20cv26 (Doc. 65); *Sandmann v. Rolling Stone, LLC*, No. 20cv27 (Doc. 59)) be, and are hereby, **DENIED AS MOOT**;

(2) Defendants' joint motions for summary judgment (*Sandmann v. New York Times*, No. 20cv23 (Doc. 53); *Sandmann v. CBS News*, No.

20cv24 (Doc. 59); *Sandmann v. ABC News, Inc.*, No. 20cv25 (Doc. 65); *Sandmann v. Gannett Co., Inc.*, No. 20cv26 (Doc. 66); *Sandmann v. Rolling Stone, LLC*, No. 20cv27 (Doc. 60)) be, and are hereby, **GRANTED**;

(3) Defendants' motions to strike (*Sandmann v. New York Times*, No. 20cv23 (Doc. 64) ; *Sandmann v. CBS News*, No. 20cv24 (Doc. 72); *Sandmann v. ABC News, Inc.*, No. 20cv25 (Doc. 78); *Sandmann v. Gannett Co., Inc.*, No. 20cv26 (Doc. 78) ; *Sandmann v. Rolling Stone, LLC*, No. 20cv27 (Doc. 72)) be, and are hereby, **DENIED AS MOOT**; and

(4) Separate judgments shall enter concurrently herewith in each of these cases.

This 26th day of July 2022.

[SEAL] **Signed By:**
William O. Bertelsman /s/ WOB
United States District Judge

Nos. 22-5734/5735/5736/5737/5738

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NICHOLAS SANDMAN Plaintiff-Appellant, v. NEW YORK TIMES COMPANY (22-5734); CBS NEWS, INCORPORATED, VIACOMCBS, INCORPORATED, AND CBS INTERACTIVE, INCORPORATED (22-5735); ABC NEWS, INC., ABC NEWS INTERACTIVE, INCORPORATED, AND WALT DISNEY COMPANY (22-5736); ROLLING STONE, LLC AND PENSKE MEDIA CORPORATION (22-5737); GANNETT COMPANY, INC. AND GANNETT SATELLITE INFORMATION NETWORK, LLC (22-5738), Defendants-Appellees.	)	ORDER (Filed Oct. 31, 2023)

BEFORE: GRIFFIN, STRANCH, and DAVIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition then was circulated

to the full court. Less than a majority of the judges* voted in favor of rehearing en banc.

Therefore, the petition is denied. Judge Griffin would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

* Judges Thapar, Bush, and Nalbandian recused themselves from participation in this ruling.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON

CIVIL ACTION NO. 2:19–00019 (WOB–CJS)

NICHOLAS SANDMANN PLAINTIFF

VS. OPINION AND ORDER

WP COMPANY LLC, d/b/a
THE WASHINGTON POST DEFENDANT

This is a defamation action arising out of events that occurred in our nation's capital on January 19, 2019, among various groups who were exercising their rights to free assembly and speech. In this age of social media, the events quickly became the subject of posts, squares, tweets, online videos, and – pertinent here – statements published by major media outlets.

As a result, plaintiff Nicholas Sandmann ("Sandmann") found himself thrust into the national spotlight. He has filed suit against defendant WP Company LLC d/b/a The Washington Post ("The Post"), alleging that The Post negligently published false statements about him that were defamatory in relation to the events in question.[1]

This case is currently before the Court on The Post's motion to dismiss Sandmann's complaint on

[1] Sandmann has also filed suit against the Cable News Network, Inc. (Cov. Case No. 19cv31) and NBC Universal Media, LLC (Cov. Case No. 19cv56).

several legal grounds. (Doc. 27). This matter is fully briefed, and the Court heard formal oral arguments on July 1, 2019. (Doc. 44).

After further study, the Court now issues the following Opinion and Order.

Factual and Procedural Background

On January 18, 2019, a group of students from Covington Catholic High School in Park Hills, Kentucky attended the March for Life in Washington, D.C., accompanied by sixteen adults. (Compl. ¶ 20). Among the students was plaintiff Nicholas Sandmann, who was wearing a "Make America Great Again" ("MAGA") hat that he had bought as a souvenir. (*Id.* ¶ 22).

Sandmann and his classmates were instructed to wait at the steps of the Lincoln Memorial for the buses to arrive for their return trip to Kentucky. (*Id.* ¶ 21). While the students waited, a group of men from an organization called the Black Hebrew Israelites began yelling racial epithets and threats of violence towards them. (*Id.* ¶¶ 23, 78(b)).

When this yelling had been going on for almost an hour, a third group of individuals – Native Americans who had been attending the Indigenous Peoples March on the National Mall that day – began approaching the students, singing and dancing, and recording a video. (*Id.* ¶ 27). At the front of the group was a Native–American activist named Nathan Phillips ("Phillips"). (*Id.* ¶¶ 3, 26). Phillips was beating a drum and singing.

When the Native Americans reached the students, Sandmann was at the front of the student group. Phillips walked very close to Sandmann, beating his drum and singing within inches of Sandmann's face. (*Id.* ¶¶ 34–35) Sandmann did not confront Phillips or move toward him, and Phillips made no attempt to go past or around Sandmann. (*Id.* ¶¶ 37–41, 50). Sandmann remained silent and looked at Phillips as he played his drum and sang. The encounter ended when Sandmann and the other students were told to board their buses. (*Id.* ¶ 48).

That evening, Kaya Taitano, a participant in the Indigenous People's March, posted online two short videos showing portions of the interaction between Sandmann and Phillips. (*Id.* ¶ 52).

At 11:13 p.m., a Twitter account tweeted a short excerpt from Taitano's videos with the comment "This MAGA loser gleefully bothering a Native American protestor at the Indigenous Peoples March." (*Id.* ¶ 54).

On Saturday, January 19, 2019, one of the Hebrew Israelite members who had been at the demonstration posted on Facebook a 1–hour, 46–minute video of the incident with Sandmann and Phillips, which Sandmann alleges accurately depicts those events. (*Id.* ¶ 63).

That same day, the Post published the first of seven articles that Sandmann alleges were defamatory in various respects: one article on January 19; four on January 20; and two on January 21. (Doc. 1 ¶¶ 111–162; Doc. 1–5 through Doc. 1–11). The Post

also published three Tweets on its Twitter page on January 19 which Sandmann alleges were likewise defamatory. (Doc. 1 ¶¶ 158–161).

On January 20, 2019, Sandmann made a public statement describing his version of the events concerning Phillips. (Doc. 1 ¶ 69). Three days later, Sandmann gave an interview to Savannah Guthrie on the *Today* show on NBC, again relating his version of the encounter with Phillips. (*Id.* ¶ 70).[2]

Sandmann filed suit against The Post on February 19, 2019, alleging a single cause of action for defamation and seeking compensatory damages of $50,000,000.00 and punitive damages of $200,000,000.00. (Doc. 1 at 37–38).

The Court must now determine whether Sandmann's allegations state a viable claim for relief. These are purely questions of law that bear no relation to the degree of public interest in the underlying events or the political motivations that some have attributed to them.

Analysis

A. Rule 12(b)(6)

On a motion to dismiss under Fed. R. Civ. P 12(b)(6), this Court must "construe the complaint in

[2] The Complaint contains many other allegations, but the Court will not lengthen this Opinion by recounting them because the Court does not find them to be relevant to the legal issues presented by The Post's motion.

the light most favorable to the nonmoving party, accept the well–pled factual allegations as true, and determine whether the moving party is entitled to judgment as a matter of law." *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007) (internal quotation marks and citation omitted). The Court need not, however, "accept the plaintiff's legal conclusions or unwarranted factual inferences as true." *Id.* "To state a valid claim, a complaint must contain direct or inferential allegations respecting all the material elements under some viable legal theory." *Id.*

"[A] court may consider exhibits attached to the complaint, public records, items appearing in the record of the case, and exhibits attached to defendant's motion to dismiss, so long as they are referred to in the complaint and are central to the claims contained therein, without converting the motion to one for summary judgment." *E.g.*, *Stein v. hhgregg, Inc.*, 873 F.3d 523, 528 (6th Cir. 2017) (citation omitted). Thus, "if a plaintiff references or quotes certain documents, or if public records refute a plaintiff's claim, a defendant may attach those documents to its motion to dismiss, and a court can then consider them in resolving the Rule 12(b)(6) motion . . . Fairness and efficiency require this practice." *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 466 (6th Cir. 2014). Where an exhibit "contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations." *See*, *e.g.*, *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 782 (6th Cir. 2015) (citation and internal quotation marks omitted); 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL

PRACTICE § 12.34(2) (Matthew Bender 3d ed. 2018) [hereinafter "MOORE'S"].

Accordingly, in ruling on The Post's motion, the Court may consider the seven articles, the Tweets, and the two YouTube videos because these materials are either referenced in or attached to the Complaint and Sandmann relies on them in support of his defamation claim. The Court excludes all other materials attached to the parties' briefs.

B. Kentucky Defamation Law[3]

In Kentucky, a cognizable claim for defamation requires:

> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Toler v. Süd–Chemie, Inc., 458 S.W.3d 276, 282 (Ky. 2014) (internal footnote omitted) (quoting RESTATEMENT

[3] Because this Court "is sitting in diversity, we apply the law of the forum state." *Croce v. The New York Times Co.*, 930 F.3d 787, 797 (6th Cir. 2019) (citing *Himmel v. Ford Motor Co.*, 342 F.3d 593, 598 (6th Cir. 2003)).

(SECOND) OF TORTS § 558 (AM. LAW INST. 1977)) (hereafter "REST. 2D."). But a "defamation claim against a media defendant cannot derive from 'a statement of opinion relating to matters of public concern [that] does not contain a provably false factual connotation'" unless "the challenged statement connotes **actual, objectively verifiable facts**." *Compuware Corp. v. Moody's Inv'rs Servs.*, 499 F.3d 520, 529 (6th Cir. 2007) (alteration in original) (emphasis added) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

The Court notes that the present motion does not require the Court to address the elements of truth/falsity, publication (which is not disputed), or negligence. At issue are only whether the statements are about Sandmann, whether they are fact or opinion, and whether they are defamatory.

Before turning to the merits, the Court must first discuss these important legal principles in more detail.

1. "About" or "Of and Concerning" the Plaintiff

The first element of a defamation claim requires that the challenged statements be "about" or "concerning" the plaintiff. *Stringer v. Wal–Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004), *overruled on other grounds by Toler v. Süd–Chemie, Inc.*, 458 S.W.3d 276 (Ky. 2014); *see also Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966).

Generally, "the plaintiff need not be specifically identified in the defamatory matter itself so long as it

was so *reasonably understood* by plaintiffs 'friends and acquaintances . . . familiar with the incident.'" *Stringer*, 151 S.W.3d at 794 (alteration in original) (emphasis added) (quoting *E. W. Scripps Co. v. Cholmondelay*, 569 S.W.2d 700, 702 (Ky. Ct. App. 1978)). But this rule is limited by the principle, now memorialized in the Restatement,[4] that "where defamatory statements are made against an aggregate body of persons, an individual member not specially imputed or designated cannot maintain an action." *See*, *e.g.*, *Louisville Times v. Stivers*, 68 S.W.2d 411, 412 (Ky. 1934) (citation omitted).

For an individual plaintiff to bring a defamation action based on such comments, the Kentucky Supreme Court has instructed that "the statement must be applicable to every member of the class, and if the words used contain no reflection upon any particular individual, no averment can make them defamatory." *Kentucky Fried Chicken, Inc. v. Sanders*, 563 S.W.2d 8, 9 (Ky. 1978). This determination should be made "in the context of the whole article." *Id.*

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[4] REST. 2d § 564A cmt. a ("no action lies for the publication of defamatory words concerning a large group or class of persons" and "no individual member of the group can recover for such broad and general defamation."); *id.* at cmt. c ("the assertion that one man out of a group of 25 has stolen an automobile may not sufficiently defame any member of the group, while the statement that all but one of a group of 25 are thieves may cast a reflection upon each of them").

2. The "Falsity" Requirement is Met Only Where the Words Used State Verifiable Facts, Not Opinions

The first element of a defamation claim also requires that the allegedly libelous statement be objectively false. Under Kentucky law, a statement in the form of an opinion can be defamatory, but it is "actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Yancey v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1989) (quoting REST. 2d § 566).[5]

In *Milkovich v. Lorain Journal Co.*, however, the Supreme Court subsequently held that "'a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection' and that 'statements that cannot reasonably [be] interpreted as stating actual facts, are not actionable.'" *Jolliff v. N.L.R.B.*, 513 F.3d 600, 610 (6th Cir. 2008) (internal quotation marks omitted) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

Here, The Post's articles concern groups of citizens who were assembled in the nation's capital to support

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[5] The Kentucky Supreme Court, in *Yancey*, 786 S.W.2d at 857, expressly adopted the Restatement's "fact-opinion distinction" almost a year before *Milkovich* was decided. Under the Restatement, "A defamatory communication may consist of a statement in the form of an opinion, but . . . only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion." *Id.* (quoting REST. 2d § 566).

or oppose various causes of importance to them. This is inherently a matter of public concern.[6]

Thus, "the falsity requirement is met only if the statement in question makes an assertion of fact – that is, **an assertion that is capable of being proved objectively incorrect**," *Clark v. Viacom Int'l, Inc.*, 617 F. App'x 495, 508 (6th Cir. 2015) (emphasis added) (citing *Milkovich*, 497 U.S. at 20), or otherwise "connotes actual, objectively verifiable facts." *Compuware Corp.*, 499 F.3d at 529.

Kentucky Courts adhere to *Milkovich*'s "provable as false" standard. *See*, *e.g.*, *Welch v. American Publ'g Co.*, 3 S.W.3d 724, 730 (Ky. 1999); *Williams v. Blackwell*, 487 S.W.3d 451, 454 (Ky. Ct. App. 2016); *Cromity v. Meiners*, 494 S.W.3d 499, 503–04 (Ky. Ct. App. 2015).

In addition, Kentucky has rejected the doctrine of "neutral reportage"; that is, a newspaper may still be held liable for quoting "newsworthy statements" of third parties. *McCall v. Courier–Journal & Louisville Times Co.*, 623 S.W.2d 882, 886–87 (Ky. 1981).

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[6] "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (internal citations and quotation marks omitted); *cf. Friends of the Vietnam Veterans Mem. v. Kennedy*, 116 F.3d 495, 496 (D.C. Cir. 1997) (noting that the Mall's "location in the heart of the nation's capital makes it a prime location for demonstrations.")

3. The Publication, Evaluated as a Whole, Must be Defamatory, Not Merely False

Lastly, to satisfy the first element of a defamation claim, the language in question must "be both false *and defamatory.* A statement that is false, but not defamatory is not actionable; a statement that is true is not actionable even if defamatory." *Dermody v. Presbyterian Church U.S.A.*, 530 S.W.3d 467, 472–73 (Ky. Ct. App. 2017) (emphasis added).[7]

Sandmann alleges that the challenged statements "are defamatory *per se*, as they are libelous on their face without resort to additional facts." (Compl. ¶ 207).

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[7] Kentucky law has long distinguished between two categories of actionable statements: libel *per se* and libel *per quod. Stringer*, 151 S.W.3d at 794–95 (citing *Hill v. Evans*, 258 S.W.2d 917, 918 (Ky. Ct. App. 1953)). "In the former class, damages are presumed and the person defamed may recover without allegation or proof of special damages. In the latter class, recovery may be sustained only upon *an allegation and* proof of special damages." *Hill*, 258 S.W.2d at 918 (emphasis added). Thus, with libel *per quod*, in order to satisfy the fourth element a plaintiff must plead and ultimately prove, special damages. *Toler*, 458 S.W.3d at 282; *Dermody*, 530 S.W.3d at 475; *Rich v. Ky. Country Day Inc.*, 793 S.W.2d 832, 837–38 (Ky. Ct. App. 1990).

"Special damages are those beyond mere embarrassment which support *actual economic loss;* general damages relate to humiliation, mental anguish, etc." *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 274 (Ky. Ct. App. 1981) (emphasis added).

Here, "there is no allegation of special damages, and [so] unless the publication may be considered as actionable per se," the Court must dismiss the action. *Hill*, 258 S.W.2d at 918; *Dermody*, 530 S.W.3d at 475); *Bell v. Courier-Journal & Louisville Times Co.*, 402 S.W.2d 84, 86 (Ky. 1966).

"[Kentucky] common law treats a broad[] class of written defamatory statements as actionable *per se*." *Stringer*, 151 S.W.3d at 794–95. But in order for a defendant's written statement to be "actionable per se justifying a recovery without averments of special damages," it must be more than annoying, offensive, or embarrassing; the words must "tend to expose the plaintiff to public hatred, ridicule, contempt or disgrace, or to induce an evil opinion of him in the minds of right–thinking people," *Digest Publ'g Co. v. Perry Publ'g Co.*, 284 S.W.2d 832, 834 (Ky. 1955), or the statement must "impugn one's competence, capacity, or fitness in the performance of his profession," *Welch*, 3 S.W.3d at 735.[8]

The Restatement explains that what constitutes actionable defamation is not subject to the whims of those in society who are faint of heart:

> Although defamation is not a question of majority opinion, neither is it a question of the existence of some individual or individuals with views sufficiently peculiar to regard as derogatory what the vast majority of persons regard as innocent. The fact that a communication tends to prejudice another in the eyes of even a substantial group is not enough if the group is one whose standards are so

[8] With written statements, "it is not necessary that the words imply a crime or impute a violation of laws, or involve moral turpitude or immoral conduct." *Digest Publ'g Co.*, 284 S.W.2d at 834; *Stringer*, 151 S.W.3d at 795.

> anti–social that it is not proper for the courts to recognize them.

REST. 2d § 559 cmt. e. "[T]he fact that a person who is prone to think evil of others, hearing words obviously intended to be innocent, by an unreasonable construction attaches to them a derogatory meaning, does not render the language defamatory." REST. 2d § 563 cmt. c.

"In determining whether a writing is libelous per se [under Kentucky law], **courts must stay within the four corners of the written communication**." *Roche v. Home Depot U.S.A.*, 197 F. App'x 395, 398 (6th Cir. 2006) (emphasis added) (citations and internal quotation marks omitted). "The words must be given their ordinary, natural meaning as defined by the average lay person. The face of the writing must be stripped of all innuendoes and explanations." *Id.*; *Dermody*, 530 S.W.3d at 475.[9]

Finally, the Court must "analyze the article in its entirety and determine if its gist or sting is defamatory." *McCall*, 623 S.W.2d at 884; *Biber v. Duplicator Sales & Serv.*, 155 S.W.3d 732, 738 (Ky. Ct. App. 2004).

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[9] A publication is considered libelous *per quod* if one must resort to "extrinsic evidence of context or circumstances" in order to comprehend the defamatory nature of the written words. *Stringer*, 151 S.W.3d at 795; *Disabled Am. Veterans, Dep't of Ky., Inc. v. Crabb*, 182 S.W.3d 541, 547 (Ky. Ct. App. 2005).

C. The Post Articles

As noted, the Complaint in this matter challenges seven articles and three Tweets. In total, these publications contain thirty–three statements that Sandmann alleges are defamatory. A chart setting forth the statements, drawn from the Complaint, is attached for reference. This discussion will refer to the statements by their number on the chart.

1. Article One

The first three articles that Sandmann challenges have in common nine statements: statements 1–3, 8, 10, 13, and 15–17.[10]

a. Statements Not "About" Sandmann

The First Article does not mention Sandmann by name, there is no identifiable description of him, and there is no picture of Sandmann in the article.

Instead, statement numbers 1–3, 8, 13, 15, and 16 refer to "hat wearing teens"; "the teens"; "teens and other apparent participants"; "A few people"; "those who should listen most closely"; and "They." These statements are not actionable because they are not about Sandmann. *See Sanders*, 563 S.W.2d at 9 (affirming dismissal of defamation complaint where newspaper published derogatory statements about KFC's gravy because there was "nothing in the present article

[10] Statement 17 requires no discussion as it does not refer to Sandmann or the events in question.

which identified" or made "direct reference to" plaintiff's particular restaurant location); *Stivers*, 68 S.W.2d at 411–12 (holding that plaintiff's defamation claim should have been dismissed because statement that the "Stivers clan" had been involved in "fist fights and gun battles" was toward a group or class and not actionable as a matter of law); *O'Brien v. Williamson Daily News*, 735 F. Supp. 218, 220 (E.D. Ky. 1990) (dismissing defamation claims of teachers not identified in an article that mentioned "teachers having affairs with students" because the article referred to "no identifiable group member and does not impugn the reputation of any specific member"), *aff'd*, 931 F.2d 893 (6th Cir. 1991).

Like the statements about groups or classes such as "the Stivers clan"; Kentucky Fried Chicken restaurants; and "teachers," statements such as "hat wearing teens," are clearly "made against an aggregate body of persons," *Stivers*, 68 S.W.2d at 412, and thus "an individual member not specially imputed or designated cannot maintain an action." *Id.* Sandmann is not specifically mentioned in the article. Therefore, because "the words used contain no reflection upon any particular individual, no averment can make them defamatory." *Sanders*, 563 S.W.2d at 9.

These statements are also not actionable for other reasons, discussed below.

b. Opinion versus Fact

Few principles of law are as well–established as the rule that statements of opinion are not actionable in libel actions.

This rule is based on the right to freedom of speech in the First Amendment to the United States Constitution. *See* David A. Elder, *Kentucky Tort Law: Defamation and the Right of Privacy* § 2.04 (1983); 13 David J. Leibson, *Kentucky Practice (Tort Law)* § 15:2 (1995).

This Court has had occasion to address this issue several times. *See Loftus v. Nazari*, 21 F. Supp.3d 849, 853–54 (E.D. Ky. 2014) (holding that patient's statements regarding allegedly poor results of plastic surgery were protected opinion); *Lassiter v. Lassiter*, 456 F. Supp. 2d 876, 881–82 (E.D. Ky. 2006) (holding that woman's statement that her ex–husband had committed adultery was protected opinion because the facts on which she based that statement were all disclosed in the publication in question), *aff'd*, 280 F. App'x 503 (6th Cir. 2008).

In *Lassiter*, this Court quoted *Leibson* on this point:

> Pure opinion . . . occurs where the commentator states the facts on which the opinion is based, or where both parties to the communication know or assume the exclusive facts on which the comment is based.

Lassiter, 456 F. Supp. 2d at 881 (alteration in original) (quoting 13 David J. Leibson, *Kentucky Practice (Tort Law)* § 15:2 at 449 (1995)).

Under these authorities, the statements that Sandmann challenges constitute protected opinions that may not form the basis for a defamation claim.

First, statements 1–3, 10, 13, 16, 17 are not actionable because they do not state or imply "actual, objectively verifiable facts." *Compuware Corp.*, 499 F.3d at 529; *Yancey*, 786 S.W.2d at 857.

Instead, these statements contain terms such as "ugly," "swarmed," "taunting," "disrespect," "ignored," "aggressive," "physicality," and "rambunctious." These are all examples of "loose, figurative," "rhetorical hyperbole" that is protected by the First Amendment because it is not "susceptible of being proved true or false." *Milkovich*, 497 U.S. at 17, 21; *Seaton v. TripAdvisor LLC*, 728 F.3d 592, 597 (6th Cir. 2013).

The above terms are also "inherently subjective," like "dirtiest," *Seaton*, 728 F.3d at 598, or "squandered" and "broke," *Welch*, 3 S.W.3d at 730, all of which are "not so definite or precise as to be branded as false." *Id.*; *see also Turner v. Wells*, 879 F.3d 1254, 1270 (11th Cir. 2018).

Next, statement 2 quotes Phillips as saying he "felt threatened" when he was "swarmed." And statement 10 quotes this assertion:

> It was getting ugly, and I was thinking: "I've got to find myself an exit out of this situation

> and finish my song at the Lincoln Memorial," Phillips recalled. I started going that way, and **that guy in the hat stood in my way and we were at an impasse. He just blocked my way and wouldn't allow me to retreat.**

(Doc. 1–5 at 3) (emphasis added).

Again, even if these statements could be construed to refer to Sandmann, they do not convey "actual, objectively verifiable facts." *Compuware*, 499 F.3d at 529; *Yancey*, 786 S.W.2d at 857. How Phillips "felt" is obviously subjective, and whether Phillips was "swarmed" or "blocked" is simply not "capable of being proved objectively incorrect." *Clark*, 617 F. App'x at 508 (citing *Milkovich*, 497 U.S. at 20).

The word "block" is a transitive and "figurative" verb meaning "to obstruct or close with obstacles."[11] "Swarm" simply means to "come together in a swarm or dense crowd."[12] And one individual obviously cannot "swarm" another.

Sandmann admits he was standing in silence in front of Phillips in the center of a confusing confrontation between the students and the Indigenous Peoples group. (Doc. 1 ¶¶ 39–44). Sandmann's intent, he avers,

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[11] *Block*, OXFORD ENGLISH DICTIONARY, OED (Oxford Univ. Press 2019), https://www.oed.com/view/Entry/20348?rskey=wenAWZ&result=1&isAdvanced=false#eid (last visited May 30, 2019) [hereinafter "OXFORD ENGLISH DICTIONARY"].

[12] *Swarm*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/195493?rskey=WxwUnf&result=1&isAdvanced=false#eid (last visited May 31, 2019).

was to diffuse the situation by remaining motionless and calm. (Doc. 1–2 at 2). Phillips, however, interpreted Sandmann's action (or lack thereof) as blocking him and not allowing him to retreat.

In statement 10, Phillips disclosed the reasons for his perception: the size of the crowd, the tense atmosphere, taunts directed at his group, and his memories of past discrimination. (Doc. 1–5). There were no undisclosed facts, and the reader was in as good a position as Phillips to judge whether the conclusion he reached – that he was "blocked" – was correct. *See Lassiter*, 456 F. Supp.2d at 882. The statement is thus pure opinion.

A case from another federal district court illustrates this principle. *See Macineirghe v. County of Suffolk*, No. 13–cv–1512, 2015 WL 4459456 (E.D.N.Y. July 21, 2015). While not binding, the Court finds its reasoning highly persuasive.

In *Macineirghe*, two brothers and their father sued numerous defendants for claims arising out of their confrontations with local police and persons employed by a local hospital. As relevant here, the father ("Tomas") asserted a libel claim against a hospital nurse ("Benavides") who gave a statement to the police in the wake of the plaintiffs' arrest. *Id.* at *7. That statement provided Benavides's observations of events inside and outside the hospital:

> The older of the two individuals [Tomas] told [his son] "Get out of here, run!" In an attempt to evade police and security the younger individual ran away and got into a yellow SUV in

> the parking lot. **The older individual then blocked the police vehicle from attempting to chase the yellow SUV.** I then saw the older man throw himself to the ground in an attempt to fake being struck by a police car. However, the police car never made contact with the older individual. I heard the older man say "I never said that the car hit my foot."

Id. (emphasis added).

The father testified that his foot simply "gave way," causing him to fall, and that the nurse's statement that he "blocked" the police car was defamatory. *Id.* at *4. The Court held, however, that the statement was "pure opinion" because all the underlying facts on which the nurse based the "blocked" statement were disclosed:

> Indeed, there can be no question that an ordinary reader would not reasonably understand Benavides's words to imply undisclosed facts justifying the opinions. On the contrary, Benavides clearly supplies the factual predicate for his opinions, which is based on his personal knowledge, the truthfulness of which the Plaintiffs do not materially dispute.
>
> . . .
>
> Benavides's opinion that Tomas was attempting to "block" Knudsen's squad car from pursuing Ian's vehicle is premised on his observations of Ian running out of the Hospital away from the police officers; Ian getting

> into a vehicle; police officers indicating that they "were going to chase" Ian . . . ; Knudsen getting into his squad car; Tomas falling to the ground in the vicinity of Knudsen's squad car before he could put it into motion; and Tomas's conflicting remarks, initially claiming to have been struck by Knudsen's car, and subsequently claiming that he had a pre–existing injury.

Id. at *14.

The Court reaches the same conclusion here regarding Phillips's "blocked" statement: it is a protected, nonactionable opinion implying no undisclosed facts.

c. Defamatory Meaning

Even assuming, *arguendo*, that the above statements are "about" Sandmann and that they convey objectively provable facts, "there is no allegation of special damages, [so] unless the publication may be considered as actionable per se," the Court must dismiss the action. *Hill*, 258 S.W.2d at 918; *Dermody*, 530 S.W.3d at 475; *Bell*, 402 S.W.2d at 86.

As noted, "[i]n determining whether a writing is libelous per se [under Kentucky law], **courts must stay within the four corners of the written communication**. The words must be given their ordinary, natural meaning as defined by the average lay person. The face of the writing must be stripped of all innuendoes and explanations." *Roche v. Home Depot*

U.S.A., 197 F. App'x 395, 398 (6th Cir. 2006) (emphasis added) (citations and internal quotation marks omitted); *Gahafer v. Ford Motor Co.*, 328 F.3d 859, 863 (6th Cir. 2003).

Then, the Court must "analyze the article in its entirety and determine if its gist or sting is defamatory." *McCall*, 623 S.W.2d at 884.

Sandmann alleges that the "gist" of the First Article is that he (1) "assaulted" or "physically intimidated Phillips"; (2) "engaged in racist conduct"; and (3) "engaged in taunts." (Doc. 1, ¶¶ 115–17). But this is not supported by the plain language in the article, which states none of those things.

Instead, Sandmann's reasoning is precisely the type of "explanation" and "innuendo" that "cannot enlarge or add to the sense or effect of the words charged to be libelous, or impute to them a meaning not warranted by the words themselves." *Dermody*, 530 S.W.3d at 475 (internal quotation marks omitted).

And while unfortunate, it is further irrelevant that Sandmann was scorned on social media. That is "extrinsic evidence of context or circumstances" outside the four corners of the article that renders the publication libel *per quod*. *Stringer*, 151 S.W.3d at 795; *Crabb*, 182 S.W.3d at 547.

First, the article cannot reasonably be read as charging Sandmann with physically intimidating Phillips or committing the criminal offense of assault. *Cf. Old Dominion Branch No. 496, Nat'l Ass'n of Letter*

Carriers, AFL–CIO v. Austin, 418 U.S. 264, 285–86 (1974). At best, Phillips is quoted in the article as saying that he "felt threatened" and "that guy in the hat . . . blocked my way." As in *Roche*, where an individual stated he "feels harassed by [the plaintiff] and wants no contact," here, Phillips' statement that he "felt threatened" is merely "a third party's subjective feelings" and that "would not tend to expose [Sandmann] to public hatred or to suggest his unfitness to work" and therefore "does not constitute libel per se." *Roche*, 197 F. App'x at 398–99.

Second, it is unreasonable to construe the article as meaning that Sandmann "engaged in racist conduct." (Doc. 1 ¶ 115). The article, at most, quotes Phillips, who stated that an individual in a hat "blocked" his path and "we were at an impasse." It is irrelevant that others may have attributed a derogatory meaning to this statement. There is nothing defamatory about being party to a stubborn "impasse." *See Cline v. T.J. Samson Cmty. Hosp.*, No. 2014–CA–001856, 2016 WL 3226325, at *6 (Ky. Ct. App. June 3, 2016) (statement that an employee was "angry" and "agitated" is not defamatory).

As the Restatement and Kentucky law make clear: if individuals, "by an unreasonable construction" attach a "derogatory meaning," this "does not render the language defamatory." REST. 2d § 563 cmt. c. The law of defamation is not "a question of the existence of some individual or individuals with views sufficiently peculiar to regard as derogatory what the vast majority of persons regard as innocent." REST. 2d § 559 cmt.

e. Instead, "[t]o be libelous per se the defamatory words must be of such a nature that courts can presume as a matter of law that they do tend to degrade or disgrace [the plaintiff], or hold him up to public hatred, contempt or scorn." *Digest Publ'g Co.*, 284 S.W.2d at 834. The words in the article fall short of that mark.

Finally, the article does not state that Sandmann "engaged in racist taunts." (Doc. 1 ¶ 117). The article makes a vague reference to teens and other participants "taunting" the "indigenous crowd" and then merely states that "[a] few people . . . began to chant build that wall,"[13] a political statement on an issue of public debate and often associated with party affiliation. This is not defamatory.

Even if false, attributing to an individual "membership in a political party in the United States that is a mainstream party and not at odds with the fundamental social order is not defamatory." *Cox v. Hatch*, 761 P.2d 556, 562 (Utah 1988) (citing PROSSER AND KEETON ON THE LAW OF TORTS, § 111 (5th ed. 1984); *see also Shields v. Booles*, 38 S.W.2d 677, 682–83 (Ky. 1931) (rejecting a defamation lawsuit because it was not libelous per se "to state incorrectly how a representative had voted upon a particular measure," *i.e.*, "in favor of legalized gambling").

The statements here, in the context of the whole article, are nothing like the words Kentucky courts have recognized as defamatory *per se. See*, *e.g.*, *Stringer*,

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[13] Statement 8.

151 S.W.3d at 792–93, 795 (written and oral statements that employees "had been fired for stealing" or "for an integrity issue"); *Ball v. E.W. Scripps Co.*, 801 S.W.2d 684, 687–88 (Ky. 1990) (Commonwealth attorney accused of "turn[ing] [criminals] right back, and they commit crime after crime; they couldn't have a better friend"); *McCall*, 623 S.W.2d at 885 (finding it defamatory to accuse an attorney of "fix[ing] the cases" or "brib[ing] a judge"); *Crabb*, 182 S.W.3d at 547 (accusations that employee engaged in a "sexual liaison" with one of her co–workers and "misappropriated" funds); *Shrout v. The TFE Group*, 161 S.W.3d 351, 355–57 (Ky. Ct. App. 2005) (continuing to report false positive result of plaintiff's drug test); *Columbia Sussex Corp.*, 627 S.W.2d at 272–73 (general manager's words which conveyed strong assertion that either hotel manager or one of her employees was involved in the hotel robbery); *Cholmondelay*, 569 S.W.2d at 701–02 (newspaper falsely stated that a minor had "pounded" another child's head "over and over again against the pavement" and "savagely beaten [him] into insensibility," thus describing the commission of a violent crime).[14]

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[14] *See also Smith v. Pure Oil Co.*, 128 S.W.2d 931, 932 (Ky. 1939) (a billboard accusing a prosecuting attorney of being a "fee grabber," thus imputing unlawful motives and dishonest means of obtaining fees and compensation from travelers); *Louisville Taxicab & Transfer Co. v. Ingle*, 17 S.W.2d 709, 710 (Ky. 1929) (a taxicab driver accused of being "discharged for drinking"); *Dixon v. Chappell*, 118 S.W. 929, 930 (Ky. 1909) (an article accusing a judge of being a "graft," a word that was commonly understood to mean "the fraudulent obtaining of public money unlawfully by the corruption of public officers"); *Fred v. Traylor*, 72 S.W. 768, 768

In sum, taking the "ordinary, natural meaning" of the words in the "four corners" of the article, and when "stripped of all innuendoes and explanations," *Roche*, 197 F. App'x at 398, the "gist or sting" of the article would not "tend to expose [Sandmann] to public hatred, ridicule, contempt or disgrace, or to induce an evil opinion of him in the minds of right–thinking people," *Digest Publ'g Co.*, 284 S.W.2d at 834, or "impugn [Sandmann]'s competence, capacity, or fitness in the performance of his profession," *Welch*, 3 S.W.3d at 735.

Therefore, the First Article is not defamatory.[15]

2. Articles Two and Three

Articles Two and Three merely repeat the statements contained in Article One, with the exception

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(Ky. 1903) (accusation that a miller "beat me out of $1,100 in three months," suggesting the miller was a dishonest tradesmen).

[15] Sandmann has made no claim for special damages. He merely asserts that the Post's articles are defamatory *per se* (Compl. ¶ 207), and he seeks general damages for "permanent harm to his reputation"; "severe emotional distress"; and the concern for his "safety." *Id.* at ¶¶ 208–10. These are not special damages. *See*, *e.g.*, *Dermody*, 530 S.W.3d at 475 (dismissing defamation claim because plaintiff "made no claim in his complaint for special damages but sought damages generally only 'for public embarrassment and humiliation [and] adverse effects on his future employment prospects and career, and . . . for the adverse effect on his future earnings and financial stability. . . .'" (alterations in original)). "Special damages are those beyond mere embarrassment which support *actual economic loss;* general damages relate to humiliation, mental anguish, etc." *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 274 (Ky. Ct. App. 1981); REST. 2d § 575 cmt. b.

that they add statement 18 – a quote from the joint statement released by Covington Catholic High School and the Diocese of Covington – and Article Three adds statement 22, a headline.

Statement 18, as set forth in the attached chart, does not mention Sandmann but speaks only of "students," and as such it is not actionable. *See Sanders*, 563 S.W.2d at 9. Further, the adjectives "jeering" and disrespectful" are subjective opinions, and the balance of the statement conveys only that the speakers are investigating the matter and will take "appropriate action, up to and including expulsion." Sandmann alleges that the statement coveys that he "violated the fundamental standards of his religious community and violated the policies of his school such that he should be expelled." (Compl. ¶ 120). But the statement, in fact, conveys the opposite: the speakers had reached *no* conclusion about what occurred and were investigating the matter. As noted with respect to Article One, Sandmann's allegation attempts to insert innuendo not found within the four corners of the publication.

Finally, statement 22 is the headline on the Third Article: "Marcher's accost by boys in MAGA caps draws ire." (Doc. 1–7 at 2). This headline does not identify Sandmann but refers only to "boys," which is nonactionable for the reasons already discussed.

Further, the headline "Marcher's accost by boys in MAGA caps draws ire" is laden with rhetorical hyperbole. *See Clark*, 617 F. App'x at 508. And the word "accost" has various meanings, including "To approach

and speak to . . . in a bold, hostile, or unwelcome manner; to waylay a person in this way; to address. . . . To draw near to or unto; to approach."[16]

Finally, statement 22 carries no defamatory meaning for the reasons stated with respect to Article One.

3. Articles Four, Five, Six, Seven and the Tweets

These publications contain substantially the same statements as in Articles One through Three. The only notable differences in the statements are as follows:

- Statements 6 and 7 include a statement of opinion from Sandmann.
- Statement 12 quotes Phillips as saying, "Why should I go around him?"
- Statement 26 quotes Phillips as stating that he heard "students" say such things as "the Indians in my state are drunks or thieves."

In addition, Sandmann asserts that these publications convey the same defamatory gist alleged in connection with the First, Second, and Third Articles. Therefore, the same analysis as outlined above applies to Articles Four through Seven, as well as the Tweets.

Articles Six and Seven, however, are different in a legally significant way in that these articles name

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[16] *Accost*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/1184?rskey=7GqmTF&result=2&isAdvanced=false#eid (last visited June 7, 2019).

Sandmann. But this simply means that some of the statements in these articles may be "about" Sandmann. The rest of the above analysis applies.

Accordingly, Sandmann cannot maintain a claim based on any of the Post's publications, and the Court will dismiss the Complaint in its entirety.

Conclusion

As the Court explained at the oral argument on this motion, in modern libel law there are many affirmative defenses, even for claims based on defamatory statements. These defenses are calculated to protect defendants, especially the press, from strict liability.

The defense that a statement of opinion is not actionable protects freedom of speech and the press guaranteed by the First Amendment.

The Court accepts Sandmann's statement that, when he was standing motionless in the confrontation with Phillips, his intent was to calm the situation and not to impede or block anyone.

However, Phillips did not see it that way. He concluded that he was being "blocked" and not allowed to "retreat." He passed these conclusions on to The Post. They may have been erroneous, but, as discussed above, they are opinion protected by the First Amendment. And The Post is not liable for publishing these opinions, for the reasons discussed in this Opinion.

Therefore, having reviewed this matter carefully, and being fully advised,

IT IS ORDERED that The Post's motion to dismiss (Doc. 27) be, and is hereby, **GRANTED**.

This 26th day of July 2019.

/s/ William O. Bertelsman
WILLIAM O. BERTELSMAN

Statement No.	Compl. ¶	Challenged Statement	Basis for Dismissal
1.	118(a) (1st Article)	Headline: "It was getting ugly': Native American drummer speaks on the MAGA-hat wearing teens who surrounded him"	Not "about" Sandmann "surrounded" and "ugly" are matters of opinion Not defamatory
2.	118(b) 129(b) (1st & 3rd Article)	"In an interview Saturday, Phillips, 64, said he felt threatened by the teens and that they suddenly swarmed around him as and [*sic*] other activists were wrapping up the march and preparing to leave."	Not "about" Sandmann "felt threatened" and "swarmed" are subjective matters of opinion Not defamatory

3.	118(c) 129(c) (1st & 3rd Article)	"Phillips, who was singing the American Indian Movement song of unity that serves as a ceremony to send the spirits home, said he noticed tensions beginning to escalate when the teens and other apparent participants from the nearby March for Life rally began taunting the dispersing indigenous crowd."	Not "about" Sandmann What constitutes "taunting" is a subjective matter of opinion Not defamatory
4.	136(a) (4th Article)	Headline: "'Opposed to the dignity of the human person': Kentucky Catholic diocese condemns teens who taunted vet at March for Life."	Not "about Sandmann" What constitutes "taunting" is a subjective matter of opinion Not defamatory
5.	136(b) (4th Article)	"A viral video of a group of Kentucky teens in "Make America Great Again' hats taunting a Native American veteran on Friday has	Not "about" Sandmann What constitutes "taunting" is a subjective matter of opinion Not defamatory

		heaped fuel on a long-running, intense argument among abortion opponents as to whether the close affiliation of many antiabortion leaders with President Trump since he took office has led to moral decay that harms the movement."	
6.	149(a) (6th Article)	"The Israelites and students exchanged taunts, videos show. The Native Americans and Hebrew Israelites say some students shouted, 'Build the wall!' although the chant is not heard on the widely circulated videos, and the Cincinnati Enquirer quoted a student at the center of the confrontation who said he did not hear anyone say it."	Not "about" Sandmann What constitutes "taunting" is a subjective matter of opinion Not defamatory

7.	156(a) (7th Article)	The Israelites and students exchanged taunts, videos show. The Native Americans and Hebrew Israelites say some students shouted, 'Build the wall!' But the chant is not heard on the widely circulated videos, and the Cincinnati Enquirer quotes Nick Sandmann, the student at the center of the confrontation, saying he did not hear anyone utter the phrase."	What constitutes "taunting" is a subjective matter of opinion Not defamatory
8.	118(d) 129(d) (1st & 3rd Article) 141(b) (5th Article)	"A few people in the March for Life crowd began to chant 'Build that wall, build that wall,' he [Phillips] said." "At one point, some reportedly chanted, "Build the wall!"	Not "about" Sandmann Not defamatory

9.	149(g) 156(j) (6th & 7th Article)	Jon Stegenga, a photojournalist who drove to Washington on Friday from South Carolina to cover the Indigenous Peoples March, recalled hearing students say 'build the wall' and 'Trump 2020.' He said it was about that time that Phillips intervened."	Not "about" Sandmann Not defamatory
10.	118(e) 129(c) (1st, 2nd, 3rd Article)	" 'It was getting ugly, and I was thinking 'I've got to find myself an exit out of this situation and finish my song at the Lincoln Memorial,' Phillips recalled, 'I started going that way, and that guy in the hat stood in my way and we were at an impasse. He just blocked my way and wouldn't allow me to treat.' "	Not "about" Sandmann What constitutes "ugly" and "blocked" are both subjective matters of opinion Not defamatory

11.	136(c) 131 (4th Article)	"A few of the young people chanted 'Build that wall, build that wall,' the man said, adding that a teen, shown smirking at him in the video, was blocking him from moving."	Not "about" Sandmann What constitutes "smirking" and "blocking" are matters of opinion Not defamatory
12.	149(h) 156(k) (6th & 7th Article)	"Most of the students moved out of his way, the video shows. But Sandmann stayed still. Asked why he [Phillips] felt the need to walk into the group of students, Phillips said he was trying to reach the top of the memorial, where friends were standing. But Phillips also said he saw more than a teenage boy in front of him. He saw a long history of white oppression of Native Americans.	What Phillips saw in Sandmann is a matter of opinion Not defamatory for Phillips to recite historical facts

		'Why should I go round him?' he asked. 'I'm just thinking of 500 years of genocide in this country, what your people have done. You don't even see me as a human being.'"	
13.	118(f) 129(f) (1st & 3rd Article)	"'It clearly demonstrates the validity of our concerns about the marginalization and disrespect of Indigenous peoples, and it shows that traditional knowledge is being ignored by those who should listen most closely,' Darren Thompson, an organizer for the group [the Indigenous Peoples Movement], said in the statement."	Not "about" Sandmann What constitutes "disrespect" and "ignor[ance]" are matters of personal opinion Not defamatory

14.	141(c) (5th Article)	"It's clear from Friday's incident on the Mall that the young men who confronted the Native American protester had somehow internalized that their behavior was acceptable. It's hard to read from that one scenario how they look at issues of face more broadly. But if part of the incident on the Mall reflected opposition to diversity, those views would be in the minority."	Not "about" Sandmann What constitutes "confront[ing]" and "internalized" are subjective matters of opinion Not defamatory
15.	118(g) 129(h) (1st & 3rd Article)	"Chase Iron Eyes, an attorney with the Lakota People Law Project, said the incident lasted about 10 minutes and ended when Phillips and other activists walked away."	Not "about" Sandmann Not defamatory

16.	118(h) 129(i) (1st & 3rd Article)	'It was an aggressive display of physicality. They were rambunctious and trying to instigate a conflict,' he [Chase Iron Eyes] said. 'We were wondering where their chaperones were. [Phillips] was really trying to defuse the situation.'" (second alteration in original).	Not "about" Sandmann What constitutes "aggressive," "physicality," and "rambunctious" are subjective matters of opinion Not defamatory
17.	118(i) (1st Article)	"Phillips, an Omaha tribe elder who also fought in the Vietnam war, has encountered anti-Native American sentiments before: . . . ."	Not "about" Sandmann What constitutes an "anti-Native American sentiment" is in the eye of the beholder Not defamatory
	129(j) (3rd Article)	"[Phillips] has encountered anti-Native American sentiment before: . . . ."	

18.	121(a) (2nd Article)	'We [CovCath school officials and the Diocese of Covington] condemn the actions of the Covington Catholic High School. students towards Nathan Phillips specifically, and Native Americans in general,' the statement said. 'The matter is being investigated and we will take appropriate action, up to and including expulsion.' . . . . The diocese's statement expressed regret that jeering, disrespectful students from a Catholic school had become the enduring image of the march."	Not "about" Sandmann Opinion What constitutes "jeering" and "disrespectful" are subjective matters of opinion
	129(g) (3rd Article)	(same, except that the last sentence was omitted in the 3rd Article)	

19.	136(d) (4th Article)	" 'We condemn the actions of the Covington Catholic high school students towards Nathan Phillips specifically, and Native Americans in general,' a statement by the Roman Catholic Diocese of Covington and Covington Catholic High School read. 'We extend our deepest apologies to Mr. Phillips. This behavior is opposed to the Church's teachings on the dignity and respect of the human person. The matter is being investigated and we will take appropriate action, up to and including expulsion. We know this incident also has tainted the entire	Not "about" Sandmann Opinion Not defamatory

		witness of the March for Life and express our sincere apologies to all those who attended the March and those who support the pro-life movement.'"	
20.	149(j) 156(m) (6th & 7th Article)	"School officials and the Catholic Diocese of Covington released a joint statement Saturday condemning and apologizing for the students' actions. The matter is being investigated and we will take appropriate action, up to and including expulsion,' the statement said."	Opinion Not defamatory
21.	156(c) (7th Article)	"The Kentucky teens' church apologized on Saturday, condemning the students' actions."	Opinion Not defamatory

22.	129(a) (3rd Article)	Headline: "Marcher's accost by boys in MAGA caps draws ire."	Not "about" Sandmann "accost" has many meanings and is a matter of subjective opinion Not defamatory
23.	141(a) (5th Article)	"Friday's incident near the Lincoln Memorial in which a group of high school boys confronted an elderly Native American man sent a ripple of fear and anger across the country. The image of a group of high school boys clad in 'Make America Great Again' hats, smirking and laughing as one of their members appeared to physically intimidate Nathan Phillips resurfaced tensions that have been simmering since President Trump's campaign began."	Not "about" Sandmann "Rhetoric" or "hyperbole" What constitutes "smirking" and what it means to "physically intimidate" another, are both matters of opinion Not defamatory

24.	149(b) 156(d) (6th & 7th Article)	"When I took that drum and hit that first beat . . . it was a supplication to God," said Nathan Phillips, a member of the Omaha tribe and a Marine veteran. 'Look at us, God, look at what is going on here; my America is being torn apart by racism, hatred, bigotry.'" (ellipsis in original)	Philip's opinion of the nation's status Labeling someone a racist is a matter of opinion
25.	149(c) 156(e)–(f) (6th & 7th Article)	"While the groups argued, some students laughed and mocked them, according to Banyamyan and another Hebrew Israelite, Ephraim Israel, who came from New York for the event. As tension grew, the Hebrew Israelites started insulting the students. . . . 'They were	What constitutes "mock[ing]" is Banyamyan's subjective opinion Not defamatory

		sitting there, mocking me as I was trying to teach my brothers, so yes the attention turned to them,' Israel told The Washington Post."	
26.	149(d) 156(g) (6th & 7th Article)	"Phillips said he and his fellow Native American activists also had issues with the students throughout the day. 'Before they got centered on the black Israelites, they would walk through and say things to each other, like, 'Oh, the Indians in my state are drunks or thieves,' the 64-year-old said."	What constitutes "issues" is a matter of opinion Not defamatory
27.	149(e) 156(g) (6th & 7th Article)	"Phillips said he heard students shout, 'Go back to Africa!' "	Not "about" Sandmann Not defamatory

28.	149(f) 156(i) (6th & 7th Article)	" 'They were mocking my ancestors in a chant, one of them was jumping up and down like a cave man,' he [Banyaman] said."	What constitutes "mocking" is a matter of personal opinion Statement is hyperbole Not defamatory
29.	149(i) 156(l) (6th & 7th Article)	"Stegenga described Phillips as emotional. 'He [Phillips] was dealing with a lot of feelings, as he was being surrounded and not being shown respect,' the photographer [Stegenga] said."	What constitutes "respect" and being "surrounded" are matters of opinion Not defamatory
30.	156(b) (7th Article)	"When a Native American elder intervened, singing and playing a prayer song, scores of students around him seem to mimic and mock him, a video posted Monday shows."	What constitutes "mimic[king]" and "mock[ing]" are matters of subjective opinion and rhetorical hyperbole Not defamatory

31.	158(a) (Tweet)	"In an interview with The Post, Omaha Tribe elder Nathan Phillips says he 'felt like the spirit was talking through me' as teens jeered and mocked him."	Not "about" Sandmann What constitutes "jeer[ing]" and mock[ing] are subjective matters of opinion Not defamatory
32.	158(b) (Tweet)	"He was singing the American Indian Movement song of unity that serves as a ceremony to send the spirits home. 'It was getting ugly, and I was thinking: 'I've got to find myself an exit out of this situation and finish my song at the Lincoln Memorial.' "	Not "about" Sandmann What constitutes "ugly" is a matter of opinion Not defamatory
33.	158(c) (Tweet)	"Phillips, who fought in the Vietnam War, says in an interview 'I started going that way, and that guy in the hat stood in my way and we were at an impasse.	Not "about" Sandmann What constitutes "block[ing] is a matter of opinion Not defamatory

		He just blocked my way and wouldn't allow me to retreat.' "	

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON

CIVIL ACTION NO. 2:19–00019 (WOB–CJS)

NICHOLAS SANDMANN **PLAINTIFF**

VS. **ORDER**

WP COMPANY LLC, d/b/a
THE WASHINGTON POST **DEFENDANT**

(Filed Oct. 28, 2019)

This matter is before the Court on the motion of the plaintiff for relief from judgment under Rule 60, reconsideration of the Court's previous Order granting defendant's motion to dismiss under Rule 59, and for leave to amend the complaint. (Doc. 49). A proposed First Amended Complaint has been tendered. (Doc. 49–2). Defendant has opposed this motion (Doc. 50), and plaintiff filed a reply. (Doc. 51).

The Court heard oral argument on this motion on October 16, 2019. (Doc. 57).

Federal Rule of Civil Procedure 15(a)(2) states that the Court "should freely give leave [to amend] when justice so requires." "Denial of leave to amend is disfavored; and a district judge should grant leave absent a substantial reason to deny." 3 James Wm. Moore et al., *Moore's Federal Practice* § 15.14[1] (Supp. 2019).

In the interest of moving this matter along, the Court will not set forth here a detailed analysis of the

Proposed Amended Complaint, which is lengthy and highly detailed.

The Court first notes that the statements alleged by plaintiff to be defamatory have not changed in the proposed First Amended Complaint. They are the same 33 statements alleged in the original Complaint and set forth in the chart attached to the Court's July 26, 2019 Opinion and Order (Doc. 47).

The Court will adhere to its previous rulings as they pertain to these statements **except** Statements 10, 11, and 33, to the extent that these three statements state that plaintiff "blocked" Nathan Phillips and "would not allow him to retreat." Suffice to say that the Court has given this matter careful review and concludes that "justice requires" that discovery be had regarding these statements and their context. The Court will then consider them anew on summary judgment.[1]

The Court also notes that the proposed First Amended Complaint makes specific allegations concerning the state of mind of Phillips, the principal source of these statements. It alleges in greater detail than the original complaint that Phillips deliberately lied concerning the events at issue, and that he had an unsavory reputation which, but for the defendant's negligence or malice, would have alerted defendant to this fact.

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[1] The Court has reviewed the videos filed by both parties and they confirm this conclusion.

The proposed First Amended Complaint also alleges that plaintiff could be identified as the subject of defendant's publications by reason of certain photographs of plaintiff and the videos. This should also be the subject of proof.[2]

Of course, these allegations will be subject to discovery and summary judgment practice. However, they do pass the requirement of "plausibility." *See generally* 2 James Wm. Moore et al., *Moore's Federal Practice* § 12.34[1] (Supp. 2019).

Therefore, the Court being advised,

IT IS ORDERED that:

1) The motion of the plaintiff for relief from judgment under Rule 60, reconsideration of the Court's previous Order granting defendant's motion to dismiss under Rule 59, and for leave to amend the complaint (Doc. 49) be, and is hereby, **GRANTED IN PART AND DENIED IN PART**, consistent with the above discussion;

2) The judgment (Doc. 48) previously entered herein be, and is hereby, **SET ASIDE AND HELD FOR NAUGHT**;

3) The proposed First Amended Complaint (Doc. 49-2) shall be **DEEMED FILED CONCURRENTLY HEREWITH**; and

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[2] The Court notes that defendant has acknowledged that the "blocking" statement concerned plaintiff. (Doc. 61 at 2).

4) Pursuant to Fed. R. Civ. P. 26(f), a scheduling conference is hereby **SET FOR TUESDAY, DECEMBER 3, 2019 AT 1:00 P.M.** in the Court's third floor conference room. The parties must comply with all requirements of the Federal Rules of Civil Procedure in preparation for such conference. The Court will, *inter alia*, set discovery deadlines at this conference, resolve any anticipated issues regarding discovery to the extent possible, and set a deadline for the filing of motions for summary judgment.

   The scheduling conference will also serve as a preliminary pretrial conference which will address the following:

   a. Will the defendant seek to file a third-party complaint against the other media entities or individuals who are alleged to have defamed plaintiff? *See* KRS 411.182, Fed. R. Civ. P. 14, 19?

   b. Should the cases now pending, or to be filed later, arising out of the same event be consolidated, as contemplated by KRS 411.182?

   c. Is the Court required to order the joinder of any parties under Fed. R. Civ. P. 19?

   d. The applicability, with regard to punitive damages, of *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (196); and *Clark v. Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006).

This 28th day of October 2019.

Signed By:

[SEAL] ***William O. Bertelsman*** /s/ WOB
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON

CIVIL ACTION NO. 2:19–00031 (WOB–CJS)

NICHOLAS SANDMANN PLAINTIFF

VS. ORDER

CABLE NEWS NETWORK, INC. DEFENDANT

(Filed Oct. 30, 2019)

This matter is before the Court on the motion of plaintiff to file an amended complaint. Defendant objects to said motion. The issues are very similar to those in Civil Case No. 2:19-cv-19-WOB-CJS, Sandmann v. WP Company LLC.

All the claims in the proposed amended complaint turn on determining the truth of what happened in the confrontation between plaintiff and Mr. Phillips. Without going into detail, if some of the statements made by Mr. Phillips are false, they are also potentially libelous. As admitted by the defendant, Courts must "give leave to amend when justice so requires."

F.R.Civ.P. 15(a)(2).

After several months of dealing with these complex cases, the Court has concluded that justice requires that all parties be given sufficient leeway to explore the issues presented. Therefore, the motion to amend will be GRANTED.

As in the Washington Post case, the Court believes that discovery is necessary to determine what happened in the unfortunate events which give rise to this litigation, and, to determine whether defendant accurately reported them, and, if it failed to do so, whether the failure was due to negligence or malice. Naturally, following a sufficient period for discovery, these issues will again be reviewed at the summary judgment phase under a more stringent standard.

THEREFORE, the Court being advised,

IT IS ORDERED AS FOLLOWS:

1. That the motion of the plaintiff to file the tendered amended complaint (Doc. 39) be, and it is, hereby GRANTED;

2. That the Rule 26(f) discovery schedule set in the Washington Post Case (2:19-cv-19-WOB-CJS) be also followed in this case, including the date set for the discovery conference and for preparation for it. A copy of that Order (Doc. 64 in 2:19-cv-19-WOB-CJS) is attached hereto and made a part hereof by reference.

This 30th day of October, 2019.

Signed By:

[SEAL] ***William O. Bertelsman*** /s/ WOB
United States District Judge

[Attachment Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON

CIVIL ACTION NO. 2:19–00056 (WOB–CJS)

NICHOLAS SANDMANN PLAINTIFF

VS. MEMORANDUM OPINION AND ORDER

NBCUNIVERAL MEDIA, LLC DEFENDANT

(Filed Nov. 21, 2019)

This matter is before the Court on the motion of defendant NBCUniversal Media ("NBC") to dismiss the First Amended Complaint ("FAC"). (Doc. 29). The FAC was filed as a matter of right by the plaintiff because defendant had moved to dismiss the original complaint. Fed. R. Civ. P. 15(a)(1)(B).

The FAC runs 139 pages, including exhibits. The subject matter is very similar to the two other libel actions by the plaintiff which are pending in this Court. *Sandmann v. WP Co. LLC*, Case No. 19cv19; *Sandmann v. Cable News Network, Inc.*, Case No. 19cv31.

The Court recently denied in part motions to dismiss filed in those two cases, and the issues here are similar. Therefore, the Court deems oral argument unnecessary.

Plaintiff's claims against all three defendants in these cases arise out of an incident that occurred at the site of the Lincoln Memorial in Washington, D.C. NBC, as did the other defendants, published news stories

stating, *inter alia*, that plaintiff "blocked" the way of one Nathan Phillips, a Native-American elder, whom he encountered at the Memorial, and that plaintiff did not allow Phillips to retreat.

The FAC alleges that these statements were false and libelous. It alleges further that plaintiff was readily identifiable due to pictures of him published on the internet. The FAC also alleges that these broadcasts and articles were published maliciously or negligently and that plaintiff suffered emotional distress as a result. Plaintiff seeks both compensatory and punitive damages.

The motion to dismiss in this matter must be granted in part and denied in part for the same reasons discussed in the two related pending cases.

Analysis

The test under Kentucky law for a statement or news broadcast to be libelous is well established.

A communication is defamatory "if it tends to (1) bring a person into public hatred, contempt or ridicule; [or] (2) cause him to be shunned or avoided . . . " 13 David J. Leibson, *Kentucky Practice, Tort Law* § 15:2 (2nd ed. 2008) (quoting *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981)).

The FAC alleges that this is exactly what occurred to the plaintiff. (FAC ¶¶ 619, 624). The FAC specifically alleges that, because of these publications, plaintiff

became "the subject of overwhelming public hatred, contempt, disgrace and scorn from the public. (FAC ¶ 207).

At the pleading stage, plaintiff is entitled to have all inferences drawn in his favor. The Court also notes that, while it has viewed the videos filed in the record, it does not rely on them here as testimony will be necessary to lay a foundation for their admission.

Therefore, as in the two related cases, the Court finds that the statements that plaintiff "blocked" Phillips or did not allow him to retreat, if false, meet the test of being libelous *per se* under the definition quoted above.[1]

Therefore, the Court having reviewed this matter, and being advised,

IT IS ORDERED:

(1) The Motion to dismiss the First Amended Complaint (Doc. 29) be, and is hereby, **GRANTED IN PART AND DENIED IN PART**, consistent with the above discussion;

(2) The case shall proceed to the discovery and summary judgment phases;

(3) The defendant shall participate in the preliminary pretrial conference set in the two related cases on **January 7, 2020 at 1:00 p.m.**, observing all requirements of the Court's orders setting such conference; and

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[1] FAC ¶¶ 402(c), 457(d)(e), 500(f), 549(c).

(4) That copies of those orders are attached herewith and incorporated by reference.

This 21st day of November 2019.

Signed By:

[SEAL] ***William O. Bertelsman*** /s/ WOB
United States District Judge

[Attachment Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

NICHOLAS SANDMAN, by and through his parents and natural guardians, TED SANDMANN and JULIE SANDMANN,	**CASE NO. 2:19-cv-19-WOB-CJS**
	JUDGE BERTELSMAN
	MAGISTRATE JUDGE SMITH
Plaintiff,	**ORDER GRANTING JOINT MOTION TO CONTINUE SCHEDULING CONFERENCE AND TO SET DATE BY WHICH TO ANSWER OR OTHERWISE PLEAD**
v.	
WP COMPANY LLC d/b/a THE WASHINGTON POST,	
Defendant.	
	(Filed Nov. 7, 2019)

Plaintiff Nicholas Sandmann and Defendant WP Company LLC d/b/a The Washington Post having filed a joint motion to continue the scheduling conference currently set for December 3, 2019 and to extend the time by which the Washington Post must answer or otherwise respond to the Plaintiff's First Amended Complaint, and the Court having reviewed the motion and being otherwise sufficiently advised;

IT IS HEREBY ORDERED that the motion is GRANTED. The currently scheduled Fed. R. Civ. P. 26(f) conference shall now be held on 7th day of

January, 2020 at 1 pm.m. All other directives contained in the Court's Order (Doc #64) remain in place. Further, the Washington Post shall have up to and including December 11, 2019 to answer or otherwise respond to the Plaintiff's First Amended Complaint.

Dated this 7th of November, 2019.

/s/ William O. Bertelsman
UNITED STATES DISTRICT JUDGE

Tendered by:

/s/ Todd V. McMurtry
Todd V. McMurtry
Kentucky Bar No. 82101
tmcmurtry@hemmerlaw.com
Kyle M. Winslow
Kentucky Bar No. 95343
kwinslow@hemmerlaw.com
250 Grandview Drive, Ste. 500
Ft. Mitchell, KY 41017
Tel: 859-344-1188
Fax: 859-578-3869

L. Lin Wood (*pro hac vice*)
lwood@linwoodlaw.com
Nicole Jennings Wade (*pro hac vice*)
nwade@linwoodlaw.com
G. Taylor Wilson (*pro hac vice*)
twilson@linwoodlaw.com
Jonathan D. Grunberg (*pro hac vice*)
jgrunberg@linwoodlaw.com
1180 W. Peachtree Street, Ste. 2040
Atlanta, GA 30309

Tel: 404-891-1402
Fax: 404-506-9111

Trial Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON

CIVIL ACTION NO. 2:19–00056 (WOB–CJS)

NICHOLAS SANDMANN **PLAINTIFF**

VS. **ORDER**

NBCUNIVERAL MEDIA, LLC **DEFENDANT**

(Filed Oct. 2, 2019)

This matter is before the Court on periodic review, and defendant having filed a motion to dismiss directed at plaintiff's Amended Complaint, and the Court being advised,

IT IS ORDERED that defendant's first motion to dismiss (Doc. 21) be, and is hereby, **DENIED AS MOOT**.

This 2nd day of October 2019.

Signed By:

[SEAL] ***William O. Bertelsman*** /s/ WOB
United States District Judge