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

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NICHOLAS SANDMANN, by and through his parents and natural guardians, TED SANDMANN and JULIE SANDMANN,	:	Docket No. 19-CV-19
	:	Covington, Kentucky
	:	Monday, July 1, 2019
Plaintiffs,	:	1:00 p.m.
versus	:	
	:	
WP COMPANY, LLC, d/b/a THE WASHINGTON POST,	:	
	:	
Defendant.	:	

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TRANSCRIPT OF ORAL ARGUMENT
BEFORE WILLIAM O. BERTELSMAN
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography, transcribed by computer.

(Proceedings commenced at 1:00 p.m.)

THE COURT: Good afternoon, everybody. The clerk will call the case, please.

DEPUTY CLERK: Covington Civil 19-19, Nicholas Sandmann versus WP Company, LLC.

THE COURT: All right. Note your appearances, please. Start with the plaintiff, I guess.

MR. McMURTRY: Thank you. Good afternoon, Your Honor. Todd McMurtry here for the plaintiff, representing Nicholas Sandmann. I'm joined by Lin Wood --

MR. WOOD: Good afternoon, Your Honor.

MR. McMURTRY: -- Nicole Wade, Jonathan Grunberg, Taylor Wilson, and Kyle Winslow.

THE COURT: All right. Is that Mr. Sandmann there?

MR. McMURTRY: This is he.

THE COURT: How do you do, sir.

THE PLAINTIFF: Good.

MR. WOOD: His parents are also here, Your Honor.

THE COURT: All right. You may be seated.

For the defense.

MR. GEISEN: Your Honor, good afternoon. I'm Bill Geisen, counsel for the Washington Post. I'd like to introduce you to our representatives, as well as the counsel here for the Post. We have Jay Kennedy, who is the general counsel, and Jim McLaughlin, the deputy general counsel of the

Post is with us as well.

THE COURT: All right.

MR. GEISEN: And, Your Honor, seated with me at the table is co-counsel, Kevin Baine, who will be presenting oral argument on behalf of the Post, Katie Meeks, and Nick Gamse.

THE COURT: All right.

First thing I want to say is everybody relax. I'm not going to decide these motions today. They're complex. I certainly need to write something so nobody will be in doubt on what I have said and why I have said it.

I've decided to hold this as a public hearing because of the great public interest in it; and looking around, I see that expectation has been met. There is great public interest in it.

The case is important, not just to the individuals involved, but because of the nature of the issues involved, issues I don't think the public clearly understands when it comes to libel.

Years ago -- it's not that many years ago. I can actually remember this -- there was a time when somebody published something that was false and derogatory of somebody, they were automatically liable. Liable for libel.

That has all changed. Beginning around 1964, the Supreme Court of the United States introduced further principles into libel law with the intent of protecting freedom of speech and

freedom of the press.

So the media, of course, has become more complex. The news is produced more instantaneously. And a lot of times, the first cases involve public officials, and they set a higher standard for a public official to recover. Then that was expanded to public figures, like football coaches, movie stars, people like that. And finally, the Supreme Court said that even a private figure, a private individual, cannot recover just because something is false. He has to show that the defendant was negligent.

So with all these factors to consider, I'm certainly not going to sit up here and try to decide this case today. But I have been over the record several times, and I do want to hear what you have to say about certain things.

I have some questions. No one should speculate from my questions how I'm going to decide this case. I, myself, don't know how I'm going to decide the case.

For those of you who are not familiar with legal procedures, this matter is before the Court not for a trial, but on what's called a motion to dismiss. A federal case, and a state case too, I guess, is started by the plaintiff filing what's called a complaint. And that sets forth claims for relief called in some places a cause of action as to why he or she wants to recover of the defendant and what the basis of his claim is.

If the defendant feels, as here, that that complaint does not state a valid claim for relief, the defendant can make a motion to dismiss, which the defendant, Washington Post, has done here today.

And the discussion or argument -- I've given each side a half an hour. The arguments will be on whether this complaint has actually stated a valid claim for relief on, I believe, seven newspaper stories that are involved.

I'm sure everybody will be discussing these various principles of libel law that have grown up over the past several decades, so I won't go over them in advance. You'll hear enough of it during the arguments, I'm sure.

So that's what we're doing here today.

If the motion to dismiss would be granted, the case would be over, and it would go to the Sixth Circuit, I'm sure. If the motion to dismiss would be denied, the plaintiff would then embark on a period of discovery, where undoubtedly they would take the depositions of all the people that were involved in these incidents and hear from them.

So that's where we are today. We're not at a trial or anything like that. But it is an important stage of the case, whether the complaint has stated what's sometimes called a cause of action.

All right. So let's get going then. Let's hear from the defendant on the motion.

MR. BAINE: Good afternoon, Your Honor. Kevin Baine for the Washington Post.

THE COURT: Welcome to our humble abode.

MR. BAINE: Thank you. If I may, I'd like to reserve ten minutes.

THE COURT: Yes.

MR. BAINE: Your Honor, this case concerns, you said seven publications, but it's actually four articles, two of which appeared in slightly different versions.

Each of these publications must be assessed independently to determine whether a cause of action can be stated against them. But I would like to begin by saying a word about the overall coverage because I think it places the articles in context.

The Post did not create this story. What it did was to bring to bear old-fashioned reporting to a story that had already gone viral on social media. And it did that by speaking to participants, by collecting different versions of what happened, by asking the organizers of the trip for comment, and then by following the story to its conclusion.

And so the initial stories, which did not name the plaintiff, reported the statement of the Diocese and the school condemning the actions of the students.

And the next day, the Post was able to identify the plaintiff and published his version of the events in a

front-page story, with the headline "Fuller View Emerges of Conflict on the Mall."

And a story four days later reported that the bishop had apologized to the students for his premature statements.

And then a couple of weeks later, the Post published another front-page story reporting the results of an investigation where the bishop had exonerated the boys.

So a story that started off with official condemnation ended up with official praise, and the Post reported it all start to finish, giving greater prominence to the findings in the students' favor than to the initial story that was critical of them.

So there are really four separate publications at issue, and I would like to address each one separately, beginning, if I may, with the first article that actually names the plaintiff and then puts the whole story together. And that would be Exhibits I and J of the complaint, the sixth and seventh articles that appeared really on day two.

The complaint had not --

THE COURT: You're losing me a little bit. You're starting with the articles that appeared the latest?

MR. BAINE: I'm starting with Exhibits I and J.

THE COURT: Okay. Well, I might have a different numbering system.

MR. BAINE: Okay. Those are the exhibits from the

complaint. And, Your Honor, it might be helpful. I handed up a white binder that has the exhibits to the complaint.

THE COURT: I have my own binder.

MR. BAINE: Okay. So Exhibits I and J were the article that first named Nicholas Sandmann and that gave the complete account of what happened.

THE COURT: Just so the record may be clear, they're not the first ones that were published?

MR. BAINE: That's correct.

THE COURT: Okay.

MR. BAINE: If you'd like to go in a different order, I'm happy to. I'm starting with these for a reason.

THE COURT: I've read them all several times.

MR. BAINE: The plaintiff complained of only one sentence in these articles that refers to him in particular. And this is what that sentence says: "Most of the students moved out of his way, the video showed, but Sandmann stayed still."

Now, that sentence could not possibly be actionable. That's exactly what the complaint alleges in paragraph 50(d); that the plaintiff did not move when Mr. Phillips was approached. So the only sentence that refers to the plaintiff in particular is neither false nor defamatory.

In context, this is the full picture that that article presented. First, that the Hebrew Israelites began the

incident by shouting racist and insulting things to the students, things like calling one student by the N word and saying that his friends were going to harvest his organs.

Mr. Sandmann's response, as reported in that article, was to, quote, "to remain motionless and calm."

Later, the students did respond by doing a school cheer, with permission of their chaperones, to drown out the hateful comments of the Israelites. That's what the story says.

Now, at that point, Mr. Phillips walked up to the group of students, the article says, walked into the group, and came within inches of Sandmann's face. And Phillips, at that point, clearly could have walked around Mr. Sandmann if he wanted to; but, as he said, he's quoted as saying in the article, "Why should I go around him?"

So the article is clear that Mr. Phillips approached Mr. Sandmann and decided not to go around him.

Mr. Sandmann, the article reported, was startled and confused and, quote, "did not make any aggressive moves." He, quote, "stayed still."

And then some of the students began doing a tomahawk chop and dancing, which is true and not challenged by the plaintiff. Indeed, the video that the plaintiff's lawyers produced in this case says the following: "Many feel the boys crossed the line and were mocking the Native Americans at that point."

Again, there was no hint in the story that Mr. Sandmann participated in that mocking, although he did. The story did not suggest that he did.

THE COURT: I don't think that's the one they're complaining about. They're complaining about the first one where he says he was swarmed by students and surrounded and Mr. Sandmann was standing there and blocked his way and left no room to retreat. That's the one they're complaining about, I think. And that was repeated in several stories.

MR. BAINE: They're complaining about both, Your Honor, but you're correct, that what you just read is the sentence from the first story.

THE COURT: That's from the first story.

MR. BAINE: That they're complaining about. So let me talk about that sentence.

THE COURT: Okay.

MR. BAINE: This is what it says: "I, Phillips, started going that way, and the 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."

Now, that's the only sentence in that whole article that refers to the plaintiff that they complain about.

THE COURT: I agree with you.

MR. BAINE: There's a sentence that says that the young man was wearing a relentless smirk, but the plaintiff's

complaint does not complain of that because that is true and nondefamatory, or at least a matter of opinion, but they don't complain about that. They only complain about the one sentence.

Now, it's our contention that that sentence is not defamatory, it's not substantially false. Why do I say it's not defamatory? Because what it says is that the unnamed student in the hat did not approach Mr. Phillips; that Phillips went toward him. "I started going that way, Phillips says."

The student did not touch Mr. Phillips. Didn't even intercept him. He just, according to Mr. Phillips, "stood in my way, blocked my way."

In basketball terminology, that would not be a blocking foul by Mr. Sandmann. If contact had been made, it would have been a charge by Mr. Phillips. Mr. Phillips approached him. Mr. Sandmann simply stood there.

Now, it does say, "wouldn't allow me to retreat." Now, obviously, the article taken as a whole could not literally mean that Mr. Phillips was literally physically prevented from moving because the article says the stand-off ended, quote, "when Phillips and the other activists walked away."

They were perfectly free to walk away. All Mr. Phillips meant in context was that Mr. Phillips was standing in between him and the Memorial.

And by the way, one could not reasonably think that on the broad expansive steps in front of the Lincoln Memorial, that one person standing still was literally physically preventing the other gentleman from moving.

Some might think it was stubborn, disrespectful, or even rude --

THE COURT: Let me stop you there and back it up a bit. I've got it marked here in my notes the paragraph -- and I agree with you, this seems to be the most important paragraph in the case. "It was getting ugly, and I was thinking that" -- this is Mr. 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, 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."

Okay. Now, this turned out to be inaccurate. You agree with that, don't you?

MR. BAINE: If you were to interpret it to mean that Mr. Phillips was literally prevented from moving in any direction, that would be inaccurate. But in the context of the article, what I think that means is that Mr. Phillips approached Mr. Sandmann, Mr. Sandmann stood still, blocked his path forward. And when Mr. Phillips says, wouldn't allow me to retreat, I think what he meant was wouldn't allow me to get

up past Mr. Sandmann to the Memorial.

But literally, that can't possibly be true. The steps are hundreds of feet wide. All he had to do was take a step to the side and walk forward, which he decided not to do.

And the article makes clear --

THE COURT: Well, that's the plaintiff's argument why it's libelous.

MR. BAINE: Beg your pardon?

THE COURT: That's the plaintiff's argument why it's libelous.

MR. BAINE: I think that's fair to say. I think the plaintiffs say it's libelous to say that Mr. Sandmann didn't move, but that's true. He didn't move. He stood his ground. And he has said in interviews --

THE COURT: It implies that he wouldn't allow him to retreat. How could he keep him from retreating unless he was threatening him in some way?

MR. BAINE: Well, literally --

THE COURT: Blocking him physically in some way?

MR. BAINE: Well, there are two issues here, I think. One is whether, as a factual matter, he was literally preventing Mr. Phillips from moving forward. And second is whether, as the plaintiff suggests, he was actually engaged in an assault of someone.

Now, if you read this to mean that he assaulted

Mr. Sandmann, Mr. Phillips, that would be defamatory. But you cannot reasonably, I don't think, read this to mean that Mr. Sandmann was engaged in an assault. An assault is a violent crime. It involves the use of force, violence, to inflict injury or, at the very least, to explicitly threaten that I am going to harm you in some way.

THE COURT: Does it imply that he was engaged in a breach of the peace or something like that?

MR. BAINE: I don't think so. I don't see how one could possibly call standing still and not moving as a breach of the peace.

That sentence, those couple of sentences -- maybe it's the one sentence -- describe an impasse in which two people, perhaps stubbornly, are facing each other and neither one decides to step aside and move forward. They both decide to stand still face to face. And it's a mutual encounter that's going on because it says, we were at an impasse.

I, Phillips, am going his way. He wouldn't step aside. Impasse. That's not defamatory. It might be disrespectful of -- some people might think that it's rude even -- for a teenager not to step aside as an older gentleman approaches him. But it's not defamatory.

And I say that because defamatory, defamation involves the idea of disgrace, as we've quoted in our papers. Merely to be embarrassing or harmful in some general way is not

enough to make it defamatory. There must be conduct attributed to the plaintiff that would expose him to disgrace, to contempt. It's a pretty high barrier. If it's simply embarrassing, unflattering, that's not enough.

It might be embarrassing to suggest that this young man didn't step aside when approached by an elderly gentleman, but it doesn't rise to the level of disgrace; to suggest that in the boisterous atmosphere of protests on the steps of the Lincoln Memorial, when approached by a Native American banging a drum, this young man didn't step aside.

THE COURT: Apparently it was enough that people called him with death threats.

MR. BAINE: Well, Your Honor --

THE COURT: It's a difficult case. I'm one to admit that. It's a difficult case.

MR. BAINE: One of the points that I'd like to make is the following: The Post and publishers in general are only responsible for the meanings that they can reasonably be thought to have intended. And the Restatement says it that way; that the meaning of publications and statements, that a reader could reasonably understand that it was intended to express.

So that's important, because what it means is that no publisher is responsible for the judgment and the conclusions that readers might make based upon their own preconceptions.

So in this case, it is unfortunately true that a lot of people bring a lot of baggage and a lot of preconceptions to any story about participants in the March for Life march, people who wear Make America Great hats Again, people who are involved in Native American protests.

There are people who bring their biases to these stories. And I dare say the one place where you cannot look for evidence of what a reasonable interpretation of a publication is is on the Internet, where people will react based upon their preconceptions, based upon nothing more than maybe seeing a photograph and then, all of a sudden, they will have an image in their mind of what must be going on.

The Post is not responsible for those kinds of judgments that people make based upon their own political, cultural, religious, other biases. They're only responsible for the meanings that they can reasonably be understood to have intended to convey.

So did the Post intend to convey that Mr. Sandmann was actually assaulting Mr. Phillips? It's not conceivably possible to think that the Post was intending to make an accusation of assault against a student simply by saying that he wouldn't step aside.

THE COURT: I think they say in their brief that this was Mr. Phillips' opinion; therefore, it's inactionable. I see you're running out of time.

MR. BAINE: Yeah, I don't know where the time is.

THE COURT: It's a complex case.

MR. BAINE: There are some statements that are statements of opinion, Your Honor.

And another important thing is that there's a video that's attached to all of these articles. Your Honor has access to some of those.

THE COURT: I've seen some of it. I'm not sure which ones I've watched.

MR. BAINE: Every online article had a video that accompanied it. And a reader, if the reader was confused, could go to online video and see students doing the school cheer, which was, by the way, rambunctious and very physically demonstrative. I would call it almost a warlike battle cry.

THE COURT: That was not from the editors, wasn't it? That wasn't the other group.

MR. BAINE: That was what the students were doing when facing the Hebrew Israelites. That is on the video.

THE COURT: I know.

MR. BAINE: Also on the videos are the tomahawk chops engaged in by these students.

So when Mr. Phillips says things like they're mocking and taunting me or when the Post writes that they were mocking and taunting, videos show, people can go look at those videos and decide, well, do I agree that that shows mocking and taunting

or do I disagree.

So some of the statements are statements of opinion; and oftentimes, it's clear that they're statements of opinion based upon an image.

There's one column, for example, that says an image appears to show that the young man was intimidating Mr. Phillips. Well, that article had the video on top of it and the sentence that says "appears to intimidate Mr. Phillips." The words "Nathan Phillips" are a link to another story, which also had the whole video there.

So people can look at the video and decide, well, do I agree or disagree that he appears to be physically intimidating.

And physically intimidating, even that is not defamatory. Physically intimidating, if that means you're standing still on a step above looking down at somebody and not moving, some people might think that appears to amount to physical intimidation, but it's not disgraceful conduct in the context of a loud and boisterous protest on the mall.

This is not taking place in a church or a cathedral. It's taking place in which there are three groups kind of yelling at each other at various times. And Mr. Sandmann is described as being motionless and calm in response to the outrageous taunts by the Hebrew Israelites. Then he acknowledged that he participates in a tomahawk chop. I don't

think it's defamatory or false to say that either of those things occurred.

What is it that the Post has said about Mr. Sandmann in particular? It said only one thing, that he didn't move when Mr. Phillips approached.

Most of the other statements in these articles are about the students in general. The second major article says there were about a hundred students there. When it says some of the students said X, well, that doesn't mean Mr. Sandmann.

THE COURT: Do we need to look at each article and judge it on its merits, or do we need to read the first article and alongside it have, let's say, amended by the subsequent article?

MR. BAINE: I think that the law views each article as a separate publication.

THE COURT: Well, that's what I'm looking at, the first one. And it says he just blocked me way and wouldn't allow me to retreat.

MR. BAINE: And also our contention --

THE COURT: We've been talking about that. A lot of things I want to nail down here.

MR. BAINE: Sure.

THE COURT: Do you admit that Mr. Sandmann is a private figure? You don't contend that he's a public figure?

MR. BAINE: We haven't argued he's a public figure

because it's not relevant to this motion. We might argue that later on.

THE COURT: Well, at least not now, you're not arguing?

MR. BAINE: It's not part of the motion, Your Honor.

THE COURT: Okay. That was the main thing I wanted to nail down.

MR. BAINE: But the fact that Mr. Sandmann is a teenage high school student with a bunch of high school students I think also has a bearing on how a reasonable reader, not someone who's got a bias or a prejudice who reads the Internet and posts comments, but a reasonable reader would, I think, take into account the fact that these are young high school students on a trip to Washington and a March for Life and on the steps of the Lincoln Memorial; and even if you thought that the article suggested that Mr. Sandmann did all the things that are only attributed to students in general, even if you thought that, that that wouldn't be enough to rise to the level of disgraceful conduct by a group of teenage boys confronted with the kind of boisterous situation on the mall so they react boisterously, as young men can do. It's not disgraceful for them to have done that.

On the other hand, I think it's fair to say that in retrospect, probably everybody can second-guess their conduct in the course of this case, starting with the black Hebrew

Israelites right on through the Native Americans right on through the chaperones and the students, everybody who covered this situation. We can all go back and ask, how could we have done this more perfectly. That's not the issue on this motion.

The issue on the motion is strictly this: Did the Washington Post say something about this plaintiff in particular that exposed him to publication and contempt in the eyes of a reasonable reader of these articles, not someone who's been influenced by the social media commentary that preceded the articles, not even by people who might have seen the Post article, as well as many other articles. But take the reasonable, objective person, not a real human being, but a reasonable man, reasonable woman, who just looks at the Post articles and the Post videos and asks, did they say something, did they attribute disgraceful or contemptible conduct to Mr. Sandmann. And I would maintain that they don't.

THE COURT: Do you throw out the argument that this statement doesn't refer to Mr. Sandmann?

MR. BAINE: Oh, not at all, Your Honor. The article refers to him in two sentences. In one sentence --

THE COURT: Well, the guy in the hat. The Kentucky test is would his friends and acquaintances know who was meant.

MR. BAINE: That refers to him.

THE COURT: And I would think that that would probably be met because a lot of his friends and acquaintances were there.

MR. BAINE: I agree with Your Honor. That is the one sentence in that article that refers to him in particular. We're not arguing that no one would know who he is. A lot of people wouldn't, but some people would.

I dare say this --

THE COURT: That's the Kentucky test.

MR. BAINE: I dare say this. Anybody who would know that's Mr. Sandmann would probably have the curiosity to click on the video and find out what really happened by watching it themselves.

And so the reality is, although this is not part of this motion, the reality is, I dare think anybody who knows Mr. Sandmann probably does not have a lower estimation of him after reading the article.

THE COURT: Then you have another argument that it's not libel per se; it's libel per quod, which would require him to make allegations of special damages.

Do you want to persist in that?

MR. BAINE: Yes, Your Honor. There's an issue about whether the Supreme Court has taken back what it said in *Sweeney*.

In *Sweeney*, the Court of Appeals, then the highest court

in the state, said this: "Statements," quote, "reasonably susceptible of a defamatory meaning as well as an innocent one, that may be defamatory by reason of their imputation or by reason of certain extrinsic facts, require evidence of pecuniary loss arising from the use thereof."

That is not the law everywhere, but it is the law of Kentucky. It was applied by, again, the Court of Appeals, then the highest court in the state, in *Towles v. Travelers Insurance Company*, where the Court said that one might draw a defamatory inference from the language used. That's their quote. But that because that was only one possible interpretation, it wasn't defamatory per se. There had to be special damages.

Now, the plaintiff argues that the Supreme Court overruled that principle in *Stringer*. We say it did not because *Stringer* did not involve an ambiguous statement at all. *Stringer* didn't talk about how to derive a meaning from an ambiguous statement. It didn't talk about libel implication. It didn't mention *Sweeney* or *Towles*.

The statement in *Stringer* was an explicit accusation of theft. It was not a matter of where the statement could be read meaning one thing or the other. So that decision in *Stringer* can't possibly take anything away from the statements in *Sweeney* and *Towles*, which remain good law in Kentucky, that if a statement is susceptible to more than one meaning and

it's only defamatory by reason of the inference or the interpretation you put on it, there have to be special damages.

That makes a lot of sense if you think about it. If a statement is only defamatory if you take it in a certain way, that means that you shouldn't presume that there were damages. There should be proof of damages.

There is no obligation of special damages in this case, nor I suspect will there ever be any amended complaint alleging special damages.

So what we have is a case in which, in some cases, the plaintiff says, oh, what was said means this. They say it means assault. We say it doesn't mean assault. I don't think it can be reasonably understood to mean that. But even if you thought that it could reasonably be meant to understood to mean that Mr. Sandmann assaulted Mr. Phillips, that is the defamation per quod, only actionable if there are special damages.

I suspect my 20 minutes are up.

THE COURT: It is. We'll give you ten minutes anyway.

MR. BAINE: Thank you, Your Honor.

MR. McMURTRY: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. McMURTRY: Todd McMurtry. I'm here to argue on

behalf of Nicholas Sandmann.

Counsel.

And thank you for the opportunity to be heard.

As you know, I represent Nicholas Sandmann. And, Your Honor, as you know, Nicholas Sandmann has been subjected to a world of attention through what happened on the Washington Mall.

But what we'd like to emphasize to the Court at the outset is that this lawsuit is not a political lawsuit. It is not a lawsuit to discourage speech directed at President Trump. The lawsuit seeks only to redress the Washington Post's false, defamatory, and negligent reporting. Really, an unprecedented injustice done to a young man, Nicholas Sandmann, who is with us here today.

The Post's reporting, in part, permanently scarred the reputation of Mr. Sandmann, who did little more than stand completely still when confronted by an adult stranger beating a drum inches from his head.

Mr. Baine and you discussed the issue of what a reasonable reader might interpret when reading the articles published about Mr. Sandmann by the Washington Post. And what I'd like to let the Court know is that on these articles that are published online, there are literally thousands of comments on the article that are available on the online version of the articles linked to the video. And those online

statements say terrible things like, "If there was ever a punchable face, it's that Nicholas Sandmann."

THE COURT: That's the comment of some reader.

MR. McMURTRY: Yes, the average reader, 8,000 of them.

THE COURT: And I believe the Indecency Act, that I had a case it was reversed on, permits people to post without the persons running the site being libel.

MR. McMURTRY: Well, it does. Certainly then Communications Decency Act does do that, and I'm not saying that the Post should be liable for that. I'm only saying what an average reader who read the article took from the article, and they published their feelings on that. So I think that that's important for the discussion.

THE COURT: And do you agree with me that the most -- everything seems to turn, or almost everything, on the statement that Mr. Phillips made, "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"?

MR. McMURTRY: Certainly that's an important statement. I think the Court has to look at the gist of the entire article. And the gist of the entire article paints a very unflattering picture of Mr. Sandmann. It characterizes him as a white person, a male, Catholic, pro life, wearing a

Make America Great Again hat, who, in essence, engaged in an assault of a peaceful Native American who was drumming his beat and singing a song of praise. And that's what the gist and the article, how it described it.

THE COURT: But is it an assault?

MR. McMURTRY: How is it an assault?

THE COURT: Is it an assault? If he says he wouldn't allow me to retreat, it's kind of vague. If he grabbed ahold of him and wouldn't allow him to retreat, that would be an assault. If, indeed, that's what it says.

MR. McMURTRY: Yes, Your Honor.

If you look at the article as a whole, it does suggest that -- and the Post's own reporting on this, which I can describe to you, says that a reader could reasonably take, from reading these articles, that Nicholas Sandmann identified, approached, confronted, surrounded, swarmed Mr. Phillips. And when you take the entirety of the article and the gist of the entire article, yes, it does allege an assault.

And I think that really takes us past the whole issue of the defamation per se versus per quod argument because it does assert what a reasonable reader could conclude was an assault upon Mr. Phillips.

And, of course, it goes on further to call him, in essence, without using the word, a racist, and attaching

racist conduct to what he said.

In response to one thing that Mr. Baine said that I do want to take issue with on the racism issue, is that we do not agree that Nicholas Sandmann engaged in the tomahawk chop.

I don't want to characterize the tomahawk chop, but we do not agree that that happened. And that would be his testimony if he were asked, that he did not engage in the tomahawk chop on the Mall.

What I think is important to look at is what the Washington Post said in its article and what it later said through its editor's notes and some of the comments of its reporters.

The Post has admitted through an editor's note that its coverage was false. It confessed on March 1 that the gist conveyed in the reporting did not occur.

For example, the Washington Post reported the false gist that -- and that is a quote from their editor's note -- "Phillips 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. The teen, shown smirking at him in the video, was blocking Phillips from moving."

And that was mentioned in the first, third, and fourth articles that we described in our complaint.

The editors, unlike the attorneys, but the editors, in

their note, say, "A more complete assessment of what occurred either contradicted or failed to confirm Phillips' account that he was prevented by one student from moving on."

So that's what the editors back in Washington are saying.

THE COURT: How many days after the initial story did that occur?

MR. McMURTRY: I think it was March 1, Your Honor.

THE COURT: Okay. Three or four days?

MR. McMURTRY: No, I'm sorry. Excuse me. Yes, I have March 1 editor's note. No, the events occurred at end of January, so this would have been more than a month after the events.

THE COURT: Okay.

MR. McMURTRY: So they go on. There are a couple of these that are important for the Court to understand.

Again, the Washington Post reported a false gist when it said in its fifth article, "One of the members of the group appeared to physically intimidate Nathan Phillips," but the editor's note admits that no such physical intimidation occurred." It says, "A more complete video does not show that the student physically intimidated Phillips."

And I think a good side note on the idea of a more complete video is that when Mr. Baine references a video that was mentioned in the articles, that is the unsourced viral video that circulated on Twitter and other social media

platforms. And, in fact, the Post based its initial reporting on this unsourced viral video, which it, we hope to prove eventually, knew was not credible. So that is another important point on this.

Again, turning to the editor's note, the Washington Post reported the false gist that, quote, "A viral video of a group of Kentucky teens in Make America Great Again hats taunting a Native American veteran on Friday."

But the editor's note on March 1 admits that no taunting occurred. It says, "A more complete assessment of what occurred either contradicted or failed to confirm that Phillips' group had been taunted by the students in the lead-up to the encounter."

Again, the Washington Post further reported a false gist when they wrote, when they initially reported, "A few people in the March for Life crowd began to chant, 'Build that wall. Build that wall.'" And I think that was a quote from Phillips. But the editor's note admits that neither Nicholas or any of the other students said that phrase. Okay. It says, "Students chanting 'Build that wall. Build that wall,' was not audible on the video."

Another point that the Washington Post reported on that is a false gist is that, "Nicholas and the teens suddenly swarmed around Phillips and it was an aggressive display of physicality. The students were rambunctious and trying to

instigate a conflict."

But the editor's note admits that Nicholas did not instigate a conflict. The editor's note says, quote, "A more complete assessment of what occurred either contradicted or failed to confirm that the students were trying to instigate a conflict," close quote.

Furthermore, the Washington Post has stated on its website as to what the purpose of an editor's note is. And I think this is very important. This is in the Washington Post's own words on their own website. An editor's note is a correction that calls into question the entire substance of an article, okay (1) raises a significant ethical matter (2) or addresses whether an article did not meet our standards. In those circumstances, it may require an editor's note and be followed by an explanation of what is at issue.

So what I described to you was the Post completely retreating from its initial coverage and admitting that it was wrong in nearly every significant circumstance. Okay.

Now, the Washington Post has confessed and admitted that the following things did not occur.

Again, Native American Elder Nathan Phillips was not prevented from moving on. In other words, Phillips was not blocked by Nicholas in any way, shape, or form.

Two, that the Indigenous People Group had not been taunted by the students in the lead-up to the encounter.

THE COURT: Well, you put it in the complaint yourself that when he appeared on television the next day, he said that he blocked the Native American.

MR. McMURTRY: I don't think our complaint says that Nicholas Sandmann blocked the individual.

THE COURT: No, you refer, in your complaint, I think at paragraph 40, you refer to this television interview he gave in a couple of days.

MR. McMURTRY: Yes.

THE COURT: And in that one, didn't he admit that he blocked Phillips?

MR. McMURTRY: No. I think he was asked, the question whether or not -- you know, why would you stand your ground, so to speak.

THE COURT: Okay.

MR. McMURTRY: And he said, you know, I'm entitled to stand where I was.

THE COURT: Maybe that's blocking somebody. You can't go through him.

MR. McMURTRY: Well, I know.

THE COURT: Standing in front of somebody in a narrow entryway and he doesn't move and the other person wants to go through, then he's blocking him.

MR. McMURTRY: Well, but if you read the article in its entirety, the Post admits and reported itself, it suggests

this idea of identifying, confronting, blocking, swarming, and surrounding, which is, you know, the suggestion of a crime when you look at it in total.

So I don't think that we can put a microscope to every sentence and say that, you know, that that's what it says. We have to look at the article in its entirety and get the gist of what's been said.

THE COURT: Just out of curiosity, did he go to New York for that interview, or did they do it remotely?

MR. McMURTRY: No, they did it here. That occurred out by the airport.

So the Post -- I said what the Post has admitted through its editor's notes is that they did not physically intimidate Phillips, that Nicholas and the students were not trying to instigate a conflict, and that Nicholas and the students did not chant "Build a wall" toward Phillips or any of his Indigenous People Group.

Now, continuing this thread, I wish to call to the Court's attention things that were written by the Washington Post reporter Megan McArdle -- and these are cited in our brief -- in response to the Washington Post's Lincoln Memorial coverage.

She said, quote, "Then a longer video surfaces proving pretty incontrovertibly that almost none of what the Post reported happened." And that's significant. That's from one

of their own reporters.

THE COURT: What exhibit is that in?

MR. McMURTRY: It's a footnote of Ms. McArdle's quotes. Oh, Ms. McArdle's commenting on the entirety of the Post's reporting on this, and we cited it in one of our footnotes, I think in our memorandum in opposition.

THE COURT: Okay. I'll look at it.

MR. McMURTRY: And she went on to say, "This is obviously not even close to what Phillips said happened and also very hard to confuse Phillips' account. The discrepancies are not minor."

She goes on to say, quote, "Any piece of information that comes from Phillips should be utterly discounted."

And she said further, "Fighting racism is a good cause. It's a great cause. But it does not require us to believe that things are not true, and it cannot afford for us to believe things that aren't true."

So in essence, she's admitting as well that the Post reporting got it entirely wrong.

So there's really, they have admitted their fault, admitted that what they've reported was false, and admitted that the manner of their reporting, they got it wrong.

Another interesting point as to what the Washington Post has said about its own reporting. Erik Wemple, who is another Washington Post reporter, authored an article entitled,

"Fuller Picture: How Major Media Outlets Handled Their Evolving Accounts of the Covington Story." And he stated in part, quote, "Given Phillips' comment to the Post that he was swarmed by the students, readers would be likely to conclude that the students saw him from afar, targeted him in advance. We learned later that Phillips himself had walked straight into the student group, making a swarm all but inevitable. Let's say a man jumps from a platform into an aquatic expanse. Did he dive into the water, or did the water surround him?"

And I think that is a strong indictment of how the Post characterized the story and its reporting and what the gist of the entire article was.

And so readers would be licensed to conclude that the article, at the very least, imputed the crime of assault toward Nicholas and the sole motivation was based upon an intense hatred of Native Americans and African Americans.

The Post's legal contentions are wholly disingenuous. For example, if the Post has admitted that the gist conveyed by its reporting was false, then why do its lawyers contend that some of the statements were substantially true?

Why, then, did the Post lawyers contend that some of the statements are protected opinion when it admits that the opinions had a sufficient and factual connotation to be deemed provably false?

THE COURT: Okay. Let's stop there. I was going to

ask you about that in a minute. Now, here's the key statement. "He just blocked my way and wouldn't allow me to retreat." Let me read the whole sentence again. "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."

Now, is that a statement of fact, or is that a statement of his opinion, Mr. Phillips' opinion?

MR. McMURTRY: Well --

THE COURT: The way this goes, as I understand it, he made the statement, he repeated it to your reporter, to the Post reporter rather, and they published it. And since we don't have in Kentucky the Neutral Reportage Act, they are responsible as if they had said it.

MR. McMURTRY: Right. I think it --

THE COURT: That might be an overstatement. But anyway, if it's opinion, it's not recoverable. It's not considered to be libel.

MR. McMURTRY: First off, we think it's a fact. We think it's a factual statement that describes an event of things that Phillips claims actually occurred.

And the Post is negligent for republishing those statements, which have now been proven to be false and admittedly false by the Post's own reporters.

And I think, Your Honor, we don't agree that it's an

opinion; but if you were to, in your mind, conclude it's an opinion, I think you'd have to go to the reasons that you had in your case *Loftus v. Nazari* when you talked about, you know, opinions that were protected opinions or not.

In the *Loftus* case, Ms. Nazari presented all of these facts, and you said the reader was left to conclude from the facts whether it was true or false.

THE COURT: Well, she was a patient of a doctor.

MR. McMURTRY: Right.

THE COURT: She said the doctor didn't do a good job on her plastic reconstructive surgery. So the last part that was the opinion that the doctor didn't do a good job, the doctor said she did this great job as medical science would permit.

MR. McMURTRY: But I think what's important is that the underlying -- the facts, I think in your opinion, you stated those facts are, in essence, admitted or agreed to.

In this circumstance, we believe that there are events described that either happened or did not happen that are either true or false, and even if the Court were to conclude, which is an opinion which we do not agree with, the connotation of the opinion is created from facts which are either provably true or provably false.

And we allege in our complaint that they're false. And at this stage of a motion to dismiss, we think that it is not

appropriate. And, you know, in actuality, it should be an issue ultimately decided by a jury.

THE COURT: Do you not agree that Phillips was being sincere when he was of the opinion that he was being blocked and not allowed to retreat, but Mr. Sandmann was of the opinion that he was just standing there and Phillips could go wherever he wanted?

MR. McMURTRY: Well, I think that the underlying fact is that what Phillips says is not true. And so therefore, it's --

THE COURT: But isn't that opinion?

MR. McMURTRY: I do not think it's an opinion at all. "He just blocked my way and wouldn't allow me to retreat." I don't know how that can be an opinion. If somebody blocks your way, that's a fact that's provable true or false.

THE COURT: This video I did watch -- apparently there are way more videos than I watched, but I did watch a couple of them. And it does show Mr. Sandmann standing there, Phillips standing in front of him, facing him, beating his drum, and it kind of stops there. Then there's other stuff. I don't think that was on the video that I was watching.

MR. McMURTRY: Well --

THE COURT: It's conceivable that Phillips thought Sandmann was blocking him, but Sandmann thought if he wants to

go around me, go this way or say excuse me, please and I'd get out of his way.

MR. McMURTRY: Well, you know, in *Milkovich*, they talk about he's a liar versus, you know, he's a Communist who follows the teachings of Marx and Lenin. It's kind of the two comparisons going from opinion.

This is much closer to saying he's a liar, which the Court in *Milkovich* found was defamatory of the wrestling coach, when the reporter claimed that the wrestling coach had lied on the stand with regard to the hearing upon the dispute in *Milkovich*.

So our fact pattern is much more similar to an exact -- nearly exactly like the fact pattern in *Milkovich* where the Court found that the opinion -- that it was not a protected opinion and that the opinion was actionable by the plaintiff, ultimately found in favor of the plaintiff.

And one other point is that our complaint alleges negligent republication. Okay. So we expect to be able to prove and have pled adequately that what was stated was false. And we also claim -- and we didn't hear any of this from Mr. Baine -- that the Post negligently republished these defamatory statements and, therefore, it should be held libel for those defamatory statements.

So I think either way you look at it, whether you analyze it from the *Milkovich* standard or simply from the negligent

republication, that we should be successful in avoiding this motion to dismiss and granted the opportunity to go forward and conduct discovery and find out more fully what the Post reporters thought, to talk to Mr. Phillips and question him.

And I guess a final point on this opinion issue, Your Honor, as to whether or not it can be proven true or false. We put out a video that says The Truth in 15 Minutes. The black Hebrew Israelites also put out a video that's an hour long that shows everything that happened.

THE COURT: I think that's the one I saw.

MR. McMURTRY: Okay. Either video -- our video shows it plain as day. But in essence, what happens here is that --

THE COURT: Where did you get your video? Who took that video; do you know?

MR. McMURTRY: Well, we got our video from a variety of sources that we found on the Internet and edited them together to show a full picture of what happened.

And when you look at the full picture of what happened with Mr. Sandmann, Nicholas here -- I guess you'd say Master Sandmann. But when you look at what happened to him, he is, in essence, you know, looking to his right, kind of laughing as Phillips bounces around with the drum. And then Phillips just leaps right up on him, and Sandmann is caught unaware and off guard.

So I think that means, that factual statement means that

this opinion, the connotations of the opinion, can be proven true or false. Either the event happened or it did not.

And given an opportunity to fully explore the video, we think Your Honor will conclude at the motion for summary judgment stage that it didn't happen and it's not a protected opinion. So that's our position on this.

Going back to the issue of the liability or negligently republishing defamatory statements of others, although this comes at the end of my argument, it is very important to everything that we're saying here, because the Post went out and republished multiple defamatory statements from other people. And as we say, and as Kentucky law says from as late as the later 1800s, tale bearers are as bad as tale makers.

The Post cannot simply pin quotes to something and argue that they are free from liability because someone else said the defamatory statement. And that's, in essence, what Mr. Baine was saying; we report things as they evolve.

In my view, the idea of reporting things as they evolve is well past the determination of whether something is true or false and well past the determination of whether something is capable of a defamatory meaning, well past publication, and down to the issue of negligence, which is not at issue today.

So Mr. Baine is, in essence, arguing that the reporting is not a negligence. So that is not a basis for dismissal. So their statements and their republication of defamatory

comments, you know, is also very important to the Court's consideration.

And as you said, Your Honor, there is no protection in Kentucky from neutral reportage. The Kentucky Supreme Court has clearly rejected that in *McCall v. Courier-Journal*. Therefore, the Post has no constitutional privilege shielding it from liability.

THE COURT: But if they can show they thought it was a reliable source, then they wouldn't be negligent, would they?

MR. McMURTRY: No, I don't think that that's correct. I don't think the reliable source would apply to --

THE COURT: Although he's not a public figure, you still have to show they were negligent.

MR. McMURTRY: Right. But that doesn't come today at the motion to dismiss.

THE COURT: No.

MR. McMURTRY: With regard to saying are the people who said the terrible things and, you know, the Congressmen and the Diocese and people that said terrible things about Nicholas Sandmann in these articles, are they reliable sources, I'm not aware of any law that would protect them.

THE COURT: What kind of articles are we talking about?

MR. McMURTRY: I'm sorry?

THE COURT: Remember they have a website and they allow people to post on the website.

MR. McMURTRY: No, I'm not --

THE COURT: According to that statute, the owner of the website is not liable.

MR. McMURTRY: I agree. At no point do I mean to suggest -- I'm familiar with the Communications Decency Act. I'm not saying --

THE COURT: Neither am I.

MR. McMURTRY: I'm talking about republishing a statement from the Diocese of Covington. I'm talking about republishing statements from elected officials, Deb Haaland, Elizabeth Warren, you know, that say some pretty rough things. Chase Iron Eyes --

THE COURT: I guess my question is, did they just allow them to be on the website, or did they republish them in the newspaper?

MR. McMURTRY: They're in the articles. What Chase Iron Eyes said, which is completely false, is in the article. And I don't know the name of the other person. I could find it. There are two people who were present on the Mall who make false statements about what occurred that lend themselves to the defamatory gist overall.

So we believe that the Post has republished those false and defamatory statements from Nathan Phillips, from Chase

Iron Eyes, and there's one other person there at the Indigenous Peoples March that also made false and defamatory statements toward Nicholas Sandmann and are mentioned in the Post article, not in online comments.

I only raised the issue of the online comments to show what an average lay reader might believe.

I don't know what my time is at this point.

THE COURT: I have one more question.

MR. McMURTRY: Sure.

THE COURT: You have claims in large amounts for punitive damages. Kentucky law is pretty strict on punitive damages. It says you would have to prove oppression, fraud, or malice.

What would your evidence be that there was any oppression, fraud, or malice? I would interpret that meaning being exculpatory about the move. That would not be oppression, fraud, or malice.

MR. McMURTRY: Well, that's easy to answer. I think that the issues that raise to the level of oppression, fraud, or malice that would give the basis for punitive damages, there are a couple.

First, the video that the Post reported on was taken off of the Internet. It was an unsourced video. Nobody knew where it came from. It was edited; and it was, in essence, weaponized to spread all across the country.

The Washington Post took a video that it knows itself was unreliable and then used that as a basis for reporting on this story. And they actually linked their story to it. And so I think that using that video is completely malicious in that it also advances the political agenda of the Post that we talk about in our complaint and its anti-President Trump agenda.

And as I said, we're not here to take a political position or to defend the president one way or the other. We're the victims, and we will contend that our client was merely a tool in the Post's aggressive reporting against the president of the United States. So that's one issue.

The second issue is on the Post's own website, they have a guide to fake videos. And it talks about different criteria. Is it edited? You know, how long it is? Is it taken out of context?

The Nick Sandmann video should be the video that they use on their website to show what a fake video is because it really is fake when compared to what other videos taken as a whole ultimately show. And so that's the second thing. We think when we present that evidence to the Court, the Court will be able to conclude that the Post violated its own policies to chase this story.

And I think the third point, which is important to determine why we think we can pursue punitive damages in this case, is that this was not hot news. This was not a crisis in

the Persian Gulf. This was not President Trump crossing the border into North Korea. This was nothing that the public needed to know about today. It's something that the Post wanted to report on right away so that they could get all of their readers excited about what was going on, which is noted by the 8,000 comments the article created.

So we think that the Post knew what it was doing, knew the risks it was taking, and did so maliciously, in a grossly negligent manner, understanding the potential consequences but throwing caution to the wind. So that would be my answer to that question, Your Honor.

THE COURT: Okay, sir.

MR. McMURTRY: Thank you very much.

THE COURT: Good presentation.

The defendant has ten minutes left.

MR. BAINE: Thank you, Your Honor. On the question of opinion pertaining to the critical statement, "I started going that way and the 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," facts there in that statement are that I was going that way, he stood in my way, he blocked my way.

Wouldn't allow me to retreat, I think is fair to say, is Mr. Phillips' perception of what was going on here as he walked up and Mr. Sandmann did not step aside. Mr. Phillips' perception is he's not allowing me to go in the direction I

want to go.

Literally, factually, he's perfectly free to walk away because he did eventually. So to the extent that there's any idea in here that, oh, I, Mr. Phillips, am prevented from doing what I want to do, which is to walk straight ahead, that's his perception of a series of facts which are set forth which are correct. That part, his perception is fair to characterize as an opinion because the basic facts are correctly stated.

The key point here on this sentence is whether or not it can fairly be understood to accuse Mr. Sandmann of assaulting Mr. Phillips. That's what would make it defamatory. Anything short of that, simply standing still, blocking someone, even blocking him in a way that doesn't allow the gentleman to move forward, even that's not disgraceful to a level of it's being defamatory.

What would make it defamatory is that it rises to the level of an assault. So that's the key question here. Can it fairly be read to mean that, that the Post was trying to say that. I don't think that's a fair and reasonable interpretation.

Now, counsel referred to these editor's notes, and I think it's important to understand that they have misquoted the Post's policy. They have said in their brief and counsel said it again today that an editor's note is, in the words of

the policy, a correction that calls into question the entire substance of an article. That is not what the Post policy says.

They put an ellipsis in their quote that totally changed the meaning. It doesn't say that an editor's note is defined as a correction that calls into question the entire substance of an article. It says, "When a correction is published that calls into question the entire substance of an article, you should also include an editor's note that explains why you're correcting it." They've totally distorted the concept of an editor's note that's set forth in the policy.

And they have another misquote. They quote the policy as saying it's necessary to use the editor's note to inform readers whenever we correct a significant statement. That's not what it says. Again, they use an ellipsis. They leave out the words "correction or clarification."

So illustrating the difficulty sometimes of accurately putting into words what someone else has said or conveyed.

Let's talk about the editor's notes, because I think they've been mischaracterized. And Your Honor can read them. But the Post exercised, I would say, great journalist responsibility by flyspecking those articles and publishing an editor's note that said that certain things that Mr. Phillips had said and certain things that others have said have not been corroborated or even been contradicted by fuller video

evidence and by further reporting.

Getting to my point, what the Post did here was bring to bear traditional reporting techniques to a story that had been viral on social media. And when they did that, they decided, you know what, our first story said, for example, that the students taunted Native Americans in the lead-up to the encounter. Well, if you look at it carefully, the taunting of the Native Americans didn't occur in the lead-up. It occurred after the Israelites had already started a confrontation.

So, actually, what was not reported by further reporting was "in the lead-up to the encounter." That's the part of that sentence that was not corroborated by further reporting.

The Post had said, as I said before, an image appeared to show that Mr. Sandmann was physically intimidating Mr. Phillips. The editor's note said, well, further video evidence doesn't indicate that he was physically intimidating Mr. Sandmann.

So what was published initially was an opinion of a columnist based upon some video. And the Post went and got more video and said, you know what, we don't think that opinion is sound so we're going to put an editor's note and say we don't think it's sound. That doesn't admit a false statement of fact.

Another editor's note said that they hadn't corroborated or confirmed Mr. Phillips' account that he was, quote,

"prevented from moving." That's what I've been saying here today. He was not physically, literally, prevented from moving. He had all the liberty to move to the side and step on, as the article says.

But the Post was careful to say, gee, if anybody took that one sentence out of context, we want to make sure there's no lasting misimpression so we're going to publish an editor's note to be clear that he wasn't literally prevented from moving.

And finally, we have an editor's note that said that it wasn't corroborated that students or March for Life participants had chanted "Build that wall." It has nothing to do with Mr. Sandmann. The Post never said that he chanted "Build that wall," but they scoured it. The video evidence said, you know what, although Mr. Phillips says he heard that, video evidence doesn't contain any evidence of any student saying "Build that wall," so we're going to say it.

That's not a retraction of any false and defamatory statement about Mr. Sandmann.

Two other things, Your Honor, that I haven't had a chance to say.

If there's one thing that I would think was really harmful to the plaintiff and the other students, it was the official released statement by the Diocese and the school, the institutions that organized this trip, that presumably had the

ability to speak to the chaperones to confirm what happened.

The Diocese and the school issue a statement condemning these students' behavior, and the Post reports that. That is one of the critical statements challenged that's false and defamatory in this lawsuit. How could the Post be libel for publishing the definitive judgment of the Diocese and the school --

THE COURT: Well, to be clear about it, I believe that statement says we're going to investigate.

MR. BAINE: Right.

THE COURT: Well, so these charges have been made, and if true, they're very serious, so we're going to investigate. And they did investigate it. As I recall, they set out, they interviewed people, and they ultimately decided that Mr. Sandmann had done nothing wrong. He just stood there.

MR. BAINE: Right.

THE COURT: He didn't block anybody.

MR. BAINE: Which the Post reported on page 1.

My point is simply that when the Post initially published the Diocese's initial statement, yes, it was not a final judgment, but it was a very harsh statement that the boys' behavior was inconsistent with the teachings of the church.

I want to make one point here. We can't possibly be held libel from repeating that assessment of church officials. In

fact, the Supreme Court of the United States and the Sixth Circuit has said you can't second-guess church officials' judgments about what does and does not violate church teachings without violating the First Amendment yourself.

So this Court could not possibly and a jury could not possibly decide that it was false for the bishop to say that the students' behavior was contrary to church teachings. You certainly couldn't say that the Post published a false statement by saying that.

THE COURT: Do you recall what exhibit that is, the Diocesan statement?

MR. BAINE: Yes, Your Honor. It's an exhibit to our reply brief, and it would be Exhibit 2 to the reply brief of the Washington Post, Your Honor.

THE COURT: I have a number of books here. Let me find that.

MR. BAINE: That's not going to be in that white binder, I don't think. It's attached to our reply brief.

I take it back. It's attached to the motion.

THE COURT: I've got a headline here with a picture of Mr. Sandmann and Mr. Phillips that said "Opposed to the Dignity of the Human Person: Kentucky Catholic diocese condemns teens who taunted vets at March for Life."

I gather this appeared in the motion of the Post.

MR. BAINE: That's right, Your Honor. And what I was

referring to as Exhibit 2 is this statement, which is the public statement from the Diocese and bishop, obviously issued for public release.

THE COURT: A press release, yes.

MR. BAINE: Finally, Your Honor, counsel again said that the Post was somehow using this incident and the plaintiff as some kind of a tool in the Post's anti-Trump campaign. And I really don't think that that's fair because, as I said at the beginning, the Post bent over backwards throughout its reporting to make sure that Mr. Sandmann's view was fairly presented. And it put the stories presenting his version and presenting the final judgment of the investigation on the front page of the story of the Post, as the earlier stories which were in the Metro section. So it gave greater prominence to the stories that were favorable.

And I think that far from using this incident as some part of an agenda, political agenda, what the Post did, as I said, was bring to bear traditional reporting. And in doing so, it brought clarity to a situation that might otherwise have been viewed solely through the lens of social media.

And when Megan McArdle, through the Post, says, quote, none of this happened, she's talking about the comments of people on social media. So it was not directed specifically at any Washington Post statement or Washington Post article.

So I do think it's fair to say that what the Post did

here was to take this story out of social media extremism and put it in a legitimate, fact-based reporting context, to the point that ultimately Mr. Sandmann's, as the bishop said, exoneration was published on the front page of a national newspaper, unlike the initial story.

And it is unfortunate, perhaps, that stories don't develop all in 24 hours. But bear in mind that when the Post first did its story, although it didn't know who Mr. Sandmann was, the story was viral already. It was all over the place. People were talking about it. So the Post decided to try to examine things itself and to try to talk to participants, try to talk to -- find out who the person was and talk to chaperones, to call the diocese, to call the school, and to continue pursuing the story and not to leave it on day one where the extremists on social media are controlling the discourse, but rather to make sure that the story is covered responsibly to the end, which it did.

Thank you very much.

MR. McMURTRY: Your Honor, can I have just three or four minutes to respond?

THE COURT: Yes, go ahead.

MR. McMURTRY: Thank you.

THE COURT: I hoped it would get clearer, but it seems to be getting more complicated.

MR. McMURTRY: I apologize.

A couple of quick comments, Your Honor. We'll just start with the diocese. In the initial article, the Post published three versions of the initial article. One came out electronically, and then it was revised, and then it came out in their Sunday paper.

But in the revised version, they cite to the Covington Catholic -- or excuse me, to the Diocese statement. And the portion of the statement that they cite is, "We condemn the actions of the Covington Catholic High School students toward Nathan Phillips specifically and to Native Americans in general," the statement said. "The matter is being investigated, and we will take appropriate action, up to and including expulsion."

So the nature of that statement is defamatory because it says we condemn the actions of the Covington Catholic students. And it raises the issue of kind of of and concerning; are these things of and concerning Nicholas Sandmann. Certainly they are because he's the face of the article. And, you know, the swarming, the taunting, all of these things, through the cases that we cited in our brief, primarily the *Stanton* case, would allow the average lay reader to conclude that the entirety of the reporting is of and concerning Nicholas Sandmann, as is the Diocesan statement.

So what the Washington Post did is they republished this Diocesan statement without any investigation, and we contend

that that was a negligent republication.

Also, on the issue of the blocking and whether or not that was defamatory or not, Mr. Baine's description to you of what occurred is not something that the average reader could have taken from the initial article and the attached video because the attached video doesn't provide enough detail to know that Mr. Phillips could have gone this way, that way, retreated. That's only exposed in the longer video.

So the initial reporting by the Post, the way it was stated, a reasonable lay reader could have easily concluded, by the angles and what happened, that Sandmann had ahold of Phillips by the arm or by his jacket and could have assaulted him. It's just not visible in the videos that are shown. So we think that only the full video shows what Mr. Baine described.

And then, you know, finally, so many of these things are issues of fact that we think requires more discovery and ultimately a review by a jury as to what these things mean; and we just ask the Court, suggest to the Court, that now is not the time to allow a case that has had this much impact and of this significance to be dismissed at this early stage.

With that, I thank you, Your Honor.

THE COURT: Well, let me get to this one. When the Diocese says, this is terrible but we're going to investigate, doesn't that indicate they don't know whether it's true or

not? I read it as they saying it's terrible if it's true, but we're going to investigate it. And they investigated it and determined it never happened.

MR. McMURTRY: Yes. Here's how I take this statement. Since it's somewhat ambiguous and can be determined either to be defamatory per se or an innocent statement, I think it's just as easy to read the article to say that the Diocese of Covington has evaluated what happened and they condemn those actions toward the students and Nathan Phillips. And then they say the matter is being investigated.

In the same sentence, "The matter is being investigated and we'll take appropriate action, up to and including expulsion."

And when you read that, it leaves the reader with the idea that the Diocese knows how horrible these things were and that they occurred and we're going to investigate and consider discipline. So it's the investigation is a part of the discipline, as opposed to whether it's true or false.

THE COURT: I think someone behind you is ready to leap from his seat. Then we're going to wrap it up.

MR. McMURTRY: Okay. I'll offer some clarification that what Mr. Baine says is that the video revealed that there was an opportunity to retreat. We contend that that is not, in fact, what the video necessarily showed in that circumstance and that you could conclude from the video that,

in fact, he was blocked and prevented from retreating by Sandmann and, therefore, that that would be imputation of a crime.

Also, with regard to the Diocesan statement, you know, they apologized to Nathan Phillips, which implies in that statement that they believed that a wrong was committed.

So those are the clarifications I wanted to make.

THE COURT: Okay.

MR. McMURTRY: Thank you, Your Honor.

THE COURT: Well, those of you who came in here thinking this was a simple case will leave with that impression corrected.

The Court will do the best it can with it. Obviously, there has to be some decision on this. I hope to get out an opinion within three or four weeks. We'll be in recess.

(Proceedings concluded at 2:20 p.m.)

C E R T I F I C A T E

I, JOAN LAMPKE AVERDICK, RDR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled case.

\s\ Joan Lampke Averdick
JOAN LAMPKE AVERDICK, RDR, CRR
Official Court Reporter

July 11, 2019
Date of Certification