

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF KENTUCKY  
3 NORTHERN DIVISION AT COVINGTON  
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5 NICHOLAS SANDMANN, by and through his : Docket No. 19-CV-19  
6 parents and natural guardians, :  
7 TED SANDMANN and JULIE SANDMANN, : Covington, Kentucky  
8 : October 16, 2019  
9 Plaintiffs, : 1:00 p.m.  
10 versus :  
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25 Defendant. :

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11 TRANSCRIPT OF ORAL ARGUMENT  
12 BEFORE WILLIAM O. BERTELSMAN  
13 UNITED STATES DISTRICT JUDGE  
14 - - -

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Proceedings recorded by mechanical stenography,  
transcribed by computer.

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

2 THE COURT: All right. Good afternoon, everybody.  
3 We're here, of course, on the lawsuit by Mr. Sandmann today  
4 against the Washington Post.

5 By way of background -- I see a lot of spectators. I  
6 don't know how much you know what's going on with this  
7 particular incident that occurred in Washington, but I have  
8 five lawsuits arising out of this incident. Three of them are  
9 against newspapers. Two of them are against people who posted  
10 comments on newspaper websites or other websites, one of which  
11 is by a United States senator who's running for president.

12 So we're confronted with a novel situation here. You  
13 have a conflict of principles of law. You have this incident  
14 that occurred. We haven't had any evidence on it yet, but  
15 it's my understanding that this resulted in a lot of  
16 harassment by the public of the plaintiff, even death threats.  
17 Had to have police at the school, have police, as I understand  
18 it, at his mother's place of employment.

19 But on the other hand, what I have to deal with is  
20 principles of libel law that we've all known for centuries and  
21 didn't have a case like this in mind. For instance, a  
22 statement of an opinion cannot be libel. That's a rule that  
23 goes back a couple hundred years. And there are other similar  
24 rules.

25 So there's a great deal of difficulty reconciling this

1 situation with the principles of libel law. And that's why I  
2 got a 95-page post-amended complaint and a 65-page brief on  
3 each side. And you've got good lawyers on both sides who are  
4 raising every point they can think of in favor of their  
5 client.

6 So it's a very complicated situation all arising out of  
7 something that apparently occurred in about 10 to 15 minutes  
8 there in Washington. Plus comments, of course, that were made  
9 about it.

10 So as you know, we had the original complaint, and we  
11 went over that and applied these principles of libel law and  
12 decided that while the incident was unfortunate, it did not  
13 reach the standards of libel law, especially the part about  
14 you can't sue on the basis of an opinion.

15 Now there has been tendered a motion to reconsider that,  
16 along with an amended complaint that goes into a lot more  
17 detail. The amended complaint runs 95 pages, which I have  
18 read several times, much to the stress of my eyes, but I have  
19 done it.

20 So this is what we have to deal with today. And I think  
21 everybody's in good will. We have excellent lawyers. Each of  
22 them have made excellent arguments. I'm doing the best I can.  
23 And we'll have to deal with the situation as we have it, and  
24 I'll do what I've been doing for 40 years and try to deal with  
25 it on an equal basis.

1           Okay. So before the Court is the plaintiff's motion to  
2           reconsider the dismissal and file a first amended complaint.  
3           So you may proceed with that, sir.

4           MR. McMURTRY: Thank you, Your Honor. Todd McMurtry  
5           here on behalf of Nicholas Sandmann.

6           May I speak from the podium?

7           THE COURT: Yes, please. Keep your voice up so we  
8           can hear you. You can raise that podium. There's a switch on  
9           the side. You can raise that.

10          MR. McMURTRY: Thank you.

11          Well, again, good afternoon, Your Honor. I want to begin  
12          by reintroducing to you my client, Nicholas Sandmann, who is  
13          seated here.

14          THE COURT: Mr. Sandmann.

15          MR. McMURTRY: Along with his parents, Ted and Julie,  
16          who are over there in the back row. And I'm also joined by my  
17          co-counsel, Lin Wood and Nicole Wade, both who are joining us  
18          from Atlanta today.

19          Your Honor, in your order, you said that I could divide  
20          my 30 minutes of argument, and what I'd like to do is take 20  
21          now and then save 10 for the end.

22          THE COURT: Okay.

23          MR. McMURTRY: Thank you.

24          Again, to begin, Your Honor, thank you for granting us  
25          this opportunity to discuss with you why we think you should

1 reconsider your judgment dismissing Nicholas Sandmann's claims  
2 with prejudice.

3 As the Sixth Circuit has held, a grant of dismissal --

4 THE COURT: Let's stop there. With prejudice, all  
5 that means is it's on the merits. It doesn't mean you can't  
6 make a motion -- well, you did tender another complaint.

7 MR. McMURTRY: Yes.

8 THE COURT: It doesn't mean you can't have -- matter  
9 of fact, you have tendered a complaint so you must realize  
10 that.

11 MR. McMURTRY: Correct. Yes, we do. And that's the  
12 point that I wanted to make, simply that implicit, we do seek  
13 to tender our amended complaint under the standard. So we  
14 accept that and agree with what Your Honor has said.

15 And as we've argued in our motion, in our response, we  
16 believe that this Court should exercise its considerable  
17 discretion to allow Nicholas Sandmann to file his first  
18 amended complaint.

19 Grant of this motion would, in essence, acknowledge that  
20 the plaintiff's first amended complaint is properly brought  
21 and that the plaintiff should be granted an opportunity under  
22 these circumstances to more fully allege his claims. And as  
23 the Court said, factually speaking, it's simple to look at;  
24 but needless to say, there was a lot happening in and around  
25 the Washington Mall on January 18th of this year.

1           Our argument in support of this motion focuses on three  
2 key points:

3           First, the clear inclusion of Nicholas Sandmann and his  
4 picture in six of the seven publications that are referenced  
5 in our complaint make the complaint -- or make those  
6 publications of and concerning Nicholas Sandmann. And we  
7 allege with respect that the Court overlooked these pictures  
8 that we referenced in our complaint, were part of the -- the  
9 pictures and viral video were part of the articles that the  
10 Washington Post published online, and as well his picture did  
11 appear in one of the print publications. So that's the first  
12 point.

13           The second point is that the editor's notes came out  
14 about ten days or so after we filed our complaint. Those were  
15 addressed in the motions and introduced by the Washington Post  
16 and also were addressed in our response to the initial motion  
17 to dismiss the complaint. And we think that by allowing us to  
18 include those in our amended complaint, it provides for a more  
19 complete factual statement of what occurred, and it's helpful  
20 to the Court and to others in assessing Mr. Sandmann's claims.  
21 And we think that the Court should permit us to include those  
22 by way of an amended complaint.

23           And then the third point is, is that we allege that the  
24 Court failed to look at the arguments that were -- to the  
25 statements that are alleged to Mr. Phillips, or the statements

1 Mr. Phillips made in his complaint; that the Court, when it  
2 looked at those in a spreadsheet, that it didn't take the  
3 statements in the context of the entire article and,  
4 therefore, missed the gist of those statements.

5 So we allege, just for purposes of seeking this motion  
6 for leave, that simply the attachment of the, you know,  
7 sentences taken away from their context is something that is  
8 in error of this Court.

9 THE COURT: Well, I believe you also add considerable  
10 materials on the background of Mr. Phillips --

11 MR. McMURTRY: Correct, we did.

12 THE COURT: -- that weren't in the original  
13 complaint.

14 MR. McMURTRY: That's right.

15 THE COURT: At least you expanded on them.

16 MR. McMURTRY: Correct. And the reason that we're  
17 seeking --

18 THE COURT: About ten pages worth.

19 MR. McMURTRY: I know. There's doubling down,  
20 there's tripling down, and there's quadrupling down.

21 THE COURT: I don't blame you.

22 MR. McMURTRY: I think that that's what we were  
23 trying to do here.

24 And when you look at the additional allegations of Mr.  
25 Phillips, really the goal of that is to seek to take his



1 statements from what the Court has described as opinion to  
2 being, in essence, a false factual narrative that was put  
3 forward for the specific political purpose and, therefore, not  
4 protected as an opinion statement. That's part of the reason  
5 why we put so much of Mr. Phillips' history as a professional  
6 protester into the complaint.

7 THE COURT: All right.

8 MR. McMURTRY: So, you know, moving forward, Your  
9 Honor, we do believe that under Rule 59 and 59(e) and 60(b),  
10 that the Court has considerable discretion to grant this,  
11 especially in light of kind of the fluidity of what happened,  
12 the fact that these editor's notes came out after the fact,  
13 and the fact that this is really an unprecedented  
14 circumstance. So we hope that the Court will exercise its  
15 considerable discretion and allow us to proceed with an  
16 amended complaint and allow Mr. Sandmann back into this court.

17 So that's the basis under the law that we seek this.  
18 Also, under Rule 15, we do not believe that it would be futile  
19 for us to do this.

20 THE COURT: Well, that's what we're here today to  
21 discuss, or will be.

22 MR. McMURTRY: Be happy to jump to that.

23 THE COURT: The defendant, of course, has an opposing  
24 view.

25 MR. McMURTRY: Yes.

1 THE COURT: That's a principal issue when you tender  
2 an amended complaint.

3 MR. McMURTRY: Right. So in this circumstance, we do  
4 not think it would be futile. And I'll just hit on the key  
5 reasons and then go into some more detail on those.

6 First, our amended complaint contains expanded  
7 allegations that are related to the Taitano video. And the  
8 Taitano video is the viral video that was embedded into the  
9 online Washington Post articles.

10 THE COURT: Okay. Now, let's get these videos  
11 straight.

12 MR. McMURTRY: Okay.

13 THE COURT: I told you before, presumably someone  
14 provided two DVDs. One is a very long one involving the  
15 altercation with the African American Israelites, whatever  
16 they call themselves. Another one was really short, and it  
17 showed Mr. Sandmann standing there and Mr. Phillips  
18 standing there. There's a bunch of kids around. Mr. Phillips  
19 standing there, beating on the drum, close up to Mr. Sandmann.  
20 It only lasts a couple minutes. But that's all it showed.

21 It didn't show whether Phillips had an opportunity to  
22 retreat, unlike what he said. So it didn't really show  
23 whether he was trying to get by, like you said, which is why I  
24 said it seemed like since this video didn't show anything that  
25 seemed out of the ordinary, that it's his opinion that he was

1 blocked. I mean, that was a principal point of the original  
2 judgment. So why don't you address that.

3 MR. McMURTRY: Okay. Well --

4 THE COURT: That was the viral videos?

5 MR. McMURTRY: There are two videos that are very  
6 similar. There is a video that's a little bit longer than a  
7 minute, and there's a video --

8 THE COURT: This was a little bit longer, about five  
9 minutes.

10 MR. McMURTRY: Okay. There is an unsourced edited  
11 viral video that was incorporated into the Washington Post  
12 initial reporting on this story that is -- is, in essence, you  
13 know, kind of a falsified statement of what went on because it  
14 only shows a snippet of what actually went on.

15 THE COURT: What do you mean by a viral video? It  
16 went to a lot of people who were interested in it and looked  
17 at it? Is that what you mean?

18 MR. McMURTRY: Tens of millions of people saw the  
19 video.

20 THE COURT: Is that what makes it viral?

21 MR. McMURTRY: Yes. It goes out on Twitter.

22 THE COURT: What if a lot of people saw other videos?  
23 How are we going to know which one we're talking about?

24 MR. McMURTRY: Well, we know which one is viral  
25 because we do have evidence which one was passed around

1 Twitter and which one ended up on the Washington Post website.

2 But the one that ended up on the Washington Post website  
3 is the shortest, edited video that was seen by tens of  
4 millions of people that the Washington Post basically took off  
5 of the Internet and placed into the story on their Washington  
6 Post website. That's the one I don't think the Court has  
7 seen. And we've corrected that in our amended complaint by  
8 specifically referencing and providing the -- you know, the  
9 path through your computer to go look at that video. It's  
10 still available on YouTube and other places.

11 THE COURT: Why don't you, when you get through here,  
12 go back and put that one on a DVD and send it to me. Run it  
13 by opposing counsel.

14 MR. McMURTRY: Yes, I agree. I will do that  
15 immediately. And I apologize for not doing it the first time.

16 What we did provide you, Your Honor, initially, to  
17 address this point on the videos, is we provided you a video  
18 that was entitled "The Truth in 15 Minutes," but I think you  
19 referenced that in your order.

20 THE COURT: I think I looked at that.

21 MR. McMURTRY: Yes. And that is a video that we  
22 created to show what actually happened, more broadly what  
23 actually happened. And we think if you look at that video,  
24 you take what Mr. Phillips said from an opinion to a, you  
25 know, false factual narrative.

1 And moreover, if you add onto that the fact that Phillips  
2 is a professional protester, as we allege in our complaint the  
3 Washington Post should have known, then we believe that to  
4 declare what he said as opinion for purposes of this motion to  
5 dismiss is not a correct assessment of what actually happened.

6 Instead, we believe that Mr. Phillips went out to the  
7 Washington Post and to others and made -- recounted what he  
8 characterized as a factual assessment of what happened there.  
9 When you look at the longer video compared to the shorter  
10 video, it clearly shows that his factual assertions are false  
11 and, therefore, should not be treated as opinion, as protected  
12 as opinion by this Court. That's how we have approached that  
13 issue.

14 So there are other reasons why we think that our amended  
15 complaint would not be futile. The second one is that the  
16 complaint contains more pictures photo-captured off of the  
17 Internet and inserted in the complaint of what the Washington  
18 Post said online and what the articles actually looked like if  
19 you were an online subscriber.

20 And part of the problem with the first complaint is that  
21 it's difficult to always get all that stuff to work right, but  
22 we did, and the amended complaint is more careful and more  
23 thorough in that regard, and it's showing you explicit  
24 pictures of the cover image of the Taitano video.

25 And just to be clear what I'm saying, Your Honor, is if

1 you had gone on the Internet the day after this event and you  
2 had gone onto the Washington Post website and you had pulled  
3 up this article, you would see a picture of Nicholas Sandmann  
4 contained in the article, and you would be able to press a  
5 button, and it would show the unedited, unsourced, short viral  
6 video. And so that's part of our argument I'll make later is  
7 why these articles are properly determined to be of and  
8 concerning Nicholas Sandmann. So that's another thing that we  
9 do with our amended complaint.

10 The third key point to show that there's not futility in  
11 bringing our amended complaint is that the editor's notes were  
12 not fully incorporated into our first complaint. As I said  
13 before, they came out afterwards. One of the editor's notes  
14 was referenced in the oral argument. I spoke at length --

15 THE COURT: I don't understand them to be arguing  
16 that those initial stories, that those are accurate. They  
17 admit they weren't accurate.

18 MR. McMURTRY: Yes, I agree.

19 THE COURT: So we don't need to spend a lot of time  
20 on that. The question is whether -- the main question seems  
21 to be, Phillips says that I was blocked and not allowed to  
22 retreat, whether that was an opinion --

23 MR. McMURTRY: And that was --

24 THE COURT: -- or was it the truth. Is it his  
25 perception? And the videos that I watched didn't show that.

1 It just showed two people standing there.

2 MR. McMURTRY: Correct.

3 THE COURT: Which is why I said that it didn't show  
4 that.

5 MR. McMURTRY: But there is a more complete video of  
6 record. There are a couple of longer videos, one that's as  
7 long as an hour, one that's 15 minutes, that shows in great  
8 detail that what Mr. Phillips said was a false factual  
9 narrative of the events and, therefore, not a protected  
10 opinion.

11 And I agree that the Washington Post, in its editor's  
12 notes, did admit that its initial reporting was incorrect.  
13 And therefore, it being incorrect and the context of the  
14 reporting and the gist of the reporting, combined with the  
15 false factual narrative, we believe, brings the publications  
16 of the Washington Post to the point of being defamatory.

17 So, you know, that's, in broad scope, what we're saying.  
18 We think that the videos take this matter from being one of  
19 opinion to one of being a false factual narrative.

20 Now -- so I made that point. I won't make it again.

21 Also in our amended complaint, we have expanded  
22 allegations that Mr. Phillips did not actually feel  
23 threatened; that he was not trying to diffuse anything; that  
24 instead, he was trying to create a media controversy.

25 So we allege this in the amended complaint. And I think

1 it goes to the point of addressing the Court's consideration  
2 of his statements as being opinion by again demonstrating that  
3 he was, in essence, a professional protester and provocateur  
4 who was looking for a problem and then making up a story.

5 I mean, he was all over the media for days after that  
6 becoming a celebrity, in essence, and we think that's what his  
7 intent was. But we really won't know until we depose him. So  
8 that's part of why we would like to be able to continue  
9 forward in this case, is to offer more about what Mr. Phillips  
10 was doing, who was paying his bills, things like that. So I  
11 think that there's much to be gained there, but I'm getting a  
12 little bit off track.

13 Another point on why we are not facing futility in this  
14 circumstance is that the amended complaint contains many  
15 allegations of -- not allegations, but instances in which  
16 individuals, including the Washington Post readers, editors,  
17 and reporters, interpreted the Washington Post's accusations  
18 against Nicholas Sandmann as being defamatory. And I think  
19 we've said that earlier when you said the Washington Post has  
20 admitted that. So we think that that also goes toward the  
21 issue of futility.

22 And then finally, our amended complaint --

23 THE COURT: You understand that if somebody posts  
24 something on their website, that the Post said something  
25 libelous, they are not liable for that under the



1 Communications Decency Act?

2 MR. McMURTRY: Yes, I agree that's absolutely true.  
3 So if you look at --

4 THE COURT: It's not a very good law, in my opinion,  
5 but it's the law.

6 MR. McMURTRY: I think we can agree on that. I don't  
7 know if the Post would agree on that.

8 But, you know, from our perspective, when we talk about  
9 the outrage that was shown on social media and so forth, you  
10 know, the Court is tasked to look at the publication and look  
11 at the context of the publication and then create -- you know,  
12 determine what the gist of the publication was and whether or  
13 not it was defamatory.

14 If it's defamatory in Kentucky, it would tend to expose  
15 somebody to hatred, ridicule, and contempt. And we allege in  
16 our complaint that this, in fact, you know, did occur. But  
17 we're not asking the Court to step outside of the complaint  
18 and say, oh, there's a social media outrage; therefore, it  
19 subjected this person to hatred, ridicule, and contempt, but  
20 only to know what social media is and how it works.

21 In other words, there are millions and millions of people  
22 out there talking about this, or were talking about this,  
23 talking about this at the time that it occurred. And that is  
24 a subtext as to, you know, why the publication was made, what  
25 the purpose of the publication was, what the gist of the

1 publication was. So we think that that is an addition to our  
2 argument that is helpful to make the amended complaint not  
3 futile.

4 And I think I've got two or three minutes here so I'll  
5 try to --

6 THE COURT: I took up some of your time.

7 MR. McMURTRY: Okay. I guess one thing I'd like to  
8 jump to, Your Honor, is something that you said in your order  
9 of your judgment. On page 28 of your judgment, you said,  
10 "However, Phillips did not see it that way. He concluded that  
11 he was being 'blocked' and not allowed to 'retreat.' He  
12 passed these conclusions on to the Post. They may have been  
13 erroneous, but, as discussed above, they are opinions  
14 protected by the First Amendment."

15 And we think that that, you know, very much goes to the  
16 heart of what we're saying

17 THE COURT: Well, that's based on the video I'm  
18 talking about.

19 MR. McMURTRY: Okay.

20 THE COURT: Mr. Sandmann is standing there, and the  
21 next day, or within a couple of days, he gave an interview to  
22 NBC, as I recall, saying, I stood there. I didn't see why I  
23 should have to move.

24 And Phillips was there, according to the video, using  
25 your video, Phillips is there beating his drum, and you don't

1 really see anybody else. There's a bunch of kids around, but  
2 you don't see anybody else. So you don't see whether he could  
3 retreat or not. You don't see what would happen if he said,  
4 Please excuse me. I'd like to go through and get up to the  
5 Lincoln Memorial. You just see the two of them standing  
6 there.

7 MR. McMURTRY: Right.

8 THE COURT: So I assume that Mr. Sandmann would -- I  
9 would have said, yeah, I would've let them pass. If he had  
10 said, Please excuse me, I would like to get by, I assume he  
11 would have let him pass. So that's why, on that one, I said  
12 it would be his opinion that he was being blocked. He wasn't  
13 really being blocked.

14 MR. McMURTRY: Right. So I'd like to take the  
15 Court's statement that that could have been erroneous and just  
16 bring that into what the Supreme Court said in the *Milkovich*  
17 case. And it basically said, "Even if the speaker states the  
18 facts upon which he bases his opinion, that those facts are  
19 either incorrect or incomplete, or if his assessment of them  
20 is erroneous, the statement may still imply a false assertion  
21 of fact."

22 And I think, from this discussion with you, Your Honor,  
23 it's clear that the expanded video would be able to  
24 demonstrate that there really was no blocking, there was no  
25 targeting, there was no taunting, there was no surrounding. I

1 mean, this is discussed -- much of this is discussed in the  
2 Post's editor's notes where they retreated from their initial  
3 factual assertions on this point and said what Mr. Phillips  
4 said is not true.

5 So it does seem that we can take what Mr. Phillips said,  
6 from the protection of the opinion that the Court has given  
7 that, and by looking and showing that what he said is  
8 erroneous, then show that it's really a false factual  
9 statement in that -- or a false factual narrative and  
10 something that is not subject to protection as opinion.

11 So I think the Court even -- you know, you recognize that  
12 yourself in your opinion. You've articulated more clearly why  
13 you said that. Bringing that into context with the *Milkovich*  
14 case and the fact that additional video which has now been  
15 pled and demonstrated in our first amended complaint shows  
16 that our first amended complaint is not futile and can  
17 proceed.

18 You know, and then turning to the issue of -- you know,  
19 we talked about the of and concerning. We talked about the  
20 defamation. I think the other thing that we would like to --  
21 the reason we would like to argue that an amended complaint  
22 would not be futile is because we provide more context as to  
23 what actually happened and what was said on the Post's  
24 website.

25 So going back to this issue of you have to look at the

1 four corners of the document, when you get online with the  
2 Washington Post or the New York Times or the Cincinnati  
3 Enquirer or whatever and you read an article, you'll get a  
4 screen. Your Honor, you probably know, you scroll down,  
5 there's different things. There's an advertisement. There's  
6 a menu by which to guide yourself. But there's also  
7 something -- and this is referenced on page 45 of our amended  
8 complaint -- which is called a Read More section, which  
9 provides context.

10 And as we talk about the defamatory nature of what the  
11 Post published, we're really talking about its assertions of  
12 racist conduct. In other words, that what Mr. Sandmann did by  
13 standing still and doing nothing, which the Court acknowledged  
14 in your order, how that is racist, or how it's racist conduct.

15 And, you know, I think --

16 THE COURT: I happened to just be reading before  
17 lunch, and they said, well, he had the hat on. A lot of  
18 people somewhere in these papers has stated that some people  
19 regard that hat as being as racist as the confederate flag.  
20 Maybe I read it someplace else. But the hat seemed to have a  
21 great deal more significance than the boys probably realized.  
22 That's my opinion. A lot of the people interpret that hat as  
23 a red flag to a bull.

24 MR. McMURTRY: That's true. And probably --

25 THE COURT: That's where some of this is coming from.

1 MR. McMURTRY: I agree and accept Your Honor's, you  
2 know, conclusion with regard to the hat.

3 THE COURT: That's not a finding of fact. That's  
4 just an opinion that I've gathered from reading all this --  
5 remember, I have five cases I've been through, and they all  
6 seem to have this same common denominator, this hat.

7 MR. McMURTRY: Right. But recognizing that half the  
8 population might feel one way and half the other, again, it  
9 doesn't mean that (A) it can't be defamatory, can't be of a  
10 racist act or racist conduct. We would allege that, in  
11 fact --

12 THE COURT: There's cases that say somebody calling  
13 somebody a racist is a matter of opinion.

14 MR. McMURTRY: Well, but not the conduct. So what  
15 we're saying here is -- we think our case would be perfectly  
16 fine if Mr. Sandmann was wearing a, you know, Cincinnati Reds  
17 cap. It wouldn't make any difference. It might have changed  
18 the Post's reporting because they might not have been able to  
19 capitalize on it for their own agenda to the same extent they  
20 would if he had a Reds cap or a Bengals cap on.

21 But the fact that they accused him of basically  
22 identifying, targeting, blocking, taunting, and surrounding a  
23 Native American, when combined with the Read More and the  
24 computer portion of the Post article. The Read More section  
25 says, "Repugnant Image: Indiana School Officials Investigate

1 Soccer Team Appearing to Give Nazi Salute." I think there is  
2 case law that says the Nazi salute is a racist act.

3 Then the next article, "Apparent Nazi Salute at Prom  
4 Investigated by Wisconsin School District."

5 Next article, "Black R&B Artist Hoped Singing for Trump  
6 Would Build a Bridge but Derailed Her Career Instead."

7 Next article, "Rebuke from Iowa. It's Time for Steve  
8 King to go."

9 But you can see in some of these articles, they're  
10 referring to other racist conduct. And I think if you look at  
11 the Phillips statements, the context of the entire article --  
12 and even I think it's fair to include these Read More  
13 statements because they were part of the electronic article --  
14 it shows that the Post reporting and use of the Phillips false  
15 factual narrative were -- that they were defamatory, and  
16 defamatory per se, and that generally speaking racist conduct.

17 THE COURT: Before I forget, here's what I want you  
18 to do when you get back. I want you to put on DVD or several  
19 DVDs every video you want me to watch, because there's been  
20 some confusion about the names of these videos. Maybe it's  
21 just my confusion. But I'm not sure I watched the ones you're  
22 telling me to watch.

23 MR. McMURTRY: Okay.

24 THE COURT: And, of course, showing them to opposing  
25 counsel and everything. File them in the record or send them

1 to me with a label on them what you're calling them so I'm  
2 sure I'm looking at the right video.

3 MR. McMURTRY: That's fine. We will do that.

4 THE COURT: There's a mix-up about that. I'm not  
5 sure -- the one I watched, you say there's two of them like  
6 that?

7 MR. McMURTRY: I took from your order that you  
8 read -- there was a Taitano video that was longer than a  
9 minute, two minutes or whatever.

10 THE COURT: This was about five minutes.

11 MR. McMURTRY: Okay. And then there was one that was  
12 edited down to less than a minute. We believe that's the  
13 one --

14 THE COURT: I only watched two. They were given to  
15 me on DVD. I assumed it had been filed in the record.

16 MR. McMURTRY: Yeah. I'll take a look at those and  
17 make sure you have the right ones.

18 THE COURT: If the defendant wants me to watch  
19 something else, you do the same thing.

20 MR. McMURTRY: Okay. Your Honor, thank you for the  
21 20 minutes.

22 THE COURT: This is the first case I've ever had  
23 where these videos and links appeared. And it seems strange  
24 to me -- apparently it's the law though -- that you can put a  
25 link in there to a video, but if somebody wanted to introduce



1 it in evidence, you'd have to call a witness that explains  
2 what it shows, a witness who -- it may not have to be the  
3 witness who took it, but it would have to be somebody who was  
4 there and can say what it shows.

5 But here you're putting in links and who knows who made  
6 these videos or where they came from, what they show. You  
7 don't have any witnesses for it. This seems strange to me,  
8 but it's the first time I've had it come up.

9 MR. McMURTRY: Well, and for purposes of our case, we  
10 alleged, you know, that's not really directly related to the  
11 of and concerning and defamatory nature of the case. It's  
12 more of the negligence of the Post posting this unsourced  
13 viral video on its website as part of one of its articles  
14 about our client.

15 THE COURT: But through your papers, you've got how  
16 many links to different videos in there?

17 MR. McMURTRY: Well --

18 THE COURT: If I'm sitting in my living room reading  
19 it, I'd have to go find a computer and look at it. Put it on  
20 a DVD and send it to me.

21 MR. McMURTRY: We'll provide an accurate record of  
22 those.

23 THE COURT: Same for the defendant.

24 MR. McMURTRY: Thank you, Your Honor.

25 THE COURT: Okay. You still have your ten-minute

1 closing.

2 MR. McMURTRY: Yes. Thank you.

3 MR. BAINE: Good morning, Your Honor. Good  
4 afternoon, I should say. Kevin Baine for the Washington Post.  
5 And with me today are Phil Collier and Bethany Breetz from the  
6 Stites & Harbison firm here in Kentucky and Thomas Hentoff and  
7 Katie Meeks from Williams & Connolly, and Kalea Clark I have  
8 here of counsel.

9 THE COURT: The Post is well represented. I'm not  
10 surprised.

11 MR. BAINE: Your Honor, there are three categories of  
12 amendments here. I want to address each one of them and  
13 demonstrate that each one is futile. None of them and none of  
14 the arguments that have been made show that any error has been  
15 made in the Court's decision dismissing the original  
16 complaint.

17 The first set of amendments relate to these videos. To  
18 simplify things a little bit, if you read the plaintiff's  
19 papers, the significance of the videos that were embedded in  
20 the online articles is to show that the plaintiff was  
21 identified. And on that basis, they say, well, okay. It's  
22 all about of and concerning the plaintiff. That's the  
23 argument. That's why the videos are arguably relevant.

24 There is no --

25 THE COURT: One of the reasons anyway. Go ahead.

1 MR. BAINE: There is no claim in the case that the  
2 Washington Post defamed the plaintiff by something that was in  
3 one of the videos. The substance of the videos is not the  
4 basis of the defamation claim.

5 The allegedly false and defamatory statements --

6 THE COURT: Well, they're saying the one where he's  
7 standing in front there -- that's the one that causes me some  
8 concern, because I'm not sure what it's supposed to stand for.  
9 Maybe that's what you're saying.

10 Do you remember which one I'm talking about? I'm sure  
11 you do.

12 MR. BAINE: Yes. What I'm trying to say is that the  
13 complaint is very specific on what they claim are the false  
14 and defamatory statements.

15 THE COURT: Right.

16 MR. BAINE: And they're statements in the article.  
17 They're not statements in the video. So you don't have to  
18 worry about the content of these long videos to decide this  
19 motion because there's no dispute of what they say, and  
20 they're not saying the Post is liable because of something in  
21 a two-and-a-half-minute video. That's not what the videos are  
22 there to show. The videos have been submitted --

23 THE COURT: Well, they may show or they may not show  
24 that Mr. Phillips was blocked or he wasn't blocked.

25 MR. BAINE: Well, let's talk about that for a second.

1 THE COURT: That's why I said it was an opinion,  
2 because there was nothing to accuse Mr. Sandmann. Had  
3 Mr. Phillips said, Please excuse me, I'd like to go on up to  
4 the Lincoln Memorial, he would have let him pass. That's why  
5 I said it was his opinion that he was blocked.

6 MR. BAINE: And the videos will not alter that, Your  
7 Honor, in any way. Here's why:

8 There are -- the only things that are alleged to be false  
9 about that incident are the words in the Post article. Okay.  
10 So the words in the Post articles are basically that Sandmann  
11 didn't move, that he remained motionless, that he didn't  
12 budge, that he and Phillips were at an impasse, and that  
13 Phillips was blocked.

14 Now, some of those statements are factual statements that  
15 are indisputably true. It is indisputably true that  
16 Mr. Sandmann did not move. They allege that themselves in  
17 their complaint, in paragraph 50 of the original complaint and  
18 I forget what it is in the amended complaint.

19 THE COURT: We've said it on --

20 MR. BAINE: They allege it, and they said it in the  
21 interview. He did not move. He remained motionless. There  
22 was an impasse. He didn't move, as did all of the other  
23 students. Those are the facts.

24 Now, whether Sandmann -- whether Phillips was blocked was  
25 something, as the Court said, in which Sandmann and Phillips

1 had this perception. The fact that Mr. Sandmann didn't move,  
2 that he remained motionless, that he stood in the path, and  
3 that he didn't budge, those are facts that are true,  
4 undisputed.

5 Mr. Phillips' perception was that because of all that, he  
6 was blocked. Mr. Sandmann's perception was, well, I didn't  
7 block him. The Court has said the nature of that statement,  
8 the word "blocked" is in the nature of an opinion based upon  
9 those disclosed facts. The video can't change that  
10 conclusion. That's a legal conclusion that the statement that  
11 he was blocked is an opinion based upon the facts.

12 THE COURT: You're leaving part of it out. He says,  
13 I couldn't retreat.

14 MR. BAINE: Right.

15 THE COURT: And the video might show whether or not  
16 he could have retreated and paint a broader picture. There  
17 might be some video among all of these videos that would show  
18 that.

19 MR. BAINE: And that, too, was Phillips' perception,  
20 that he couldn't retreat.

21 Now, as I argued the last time I was at this podium, if  
22 you read that article in its entirety, no one can take  
23 literally as a factual statement the statement that "I  
24 couldn't retreat," because the article makes clear that he  
25 did. The article says the incident ended when Phillips walked

1 away. He could retreat literally. So he wasn't making a --

2 THE COURT: Well, the incident ended when the boys  
3 went to catch the bus.

4 MR. BAINE: That may be true, but that's not what the  
5 article says. The article says the incident ended when  
6 Phillips walked away.

7 So if you're asking did the article say something false,  
8 the article, taken as a whole, makes clear that Phillips was  
9 not prevented from walking away literally. His perception  
10 was, I couldn't retreat. I think what he meant was, I  
11 couldn't retreat up to the Memorial. But you cannot read that  
12 first article literally to say that he couldn't move away,  
13 because the article says that he did.

14 Now, as I said, the relevance of this video is on this of  
15 and concerning point. And I thought that the gist of the  
16 plaintiff's motion was that the Court erred when it said that  
17 certain statements weren't about Mr. Sandmann. I just want to  
18 make clear that we didn't read the Court's opinion to say that  
19 the statement about blocking wasn't about Mr. Sandmann. To  
20 the contrary, the Court, at page 13 of its opinion, identifies  
21 nine statements from the first article that are being  
22 challenged. One to 3, 8, 10, 13, 15 to 17. And then the  
23 Court said, eight of those were not about Sandmann. All but  
24 statement 10.

25 The Court did not say statement 10 is not about Sandmann.

1 Statement 10 is a statement that the guy in the hat just stood  
2 there, we're at an impasse, he blocked my way. The Court did  
3 not rule that was not about Sandmann.

4 The Court ruled that was not actionable. And this is on  
5 pages 22 and -- no, excuse me. Just to confirm this, at pages  
6 22 and 23 of the transcript, the Court said to me that his  
7 friends and acquaintances knew who that sentence is referring  
8 to. I agreed.

9 And then at page 11 of the transcript, you said, "The  
10 only sentence in the whole article that refers to the  
11 plaintiff that they complain about is that statement about  
12 blocking." And I agreed. And so that wasn't the basis for  
13 the Court's ruling that wasn't actionable.

14 Rather, at pages 17 and 22, the Court gave its reasons.  
15 And the Court said that statement's not actionable because  
16 blocking is a matter of opinion and there's nothing defamatory  
17 about what was described. This description of this impasse,  
18 of Mr. Sandmann not moving, of being blocked, wasn't  
19 defamatory.

20 In the context of this rambunctious, boisterous incident  
21 that's going on, the fact that two people are standing at an  
22 impasse doesn't subject Mr. Sandmann to public hatred,  
23 contempt, or ridicule. It's not defamatory. That was the  
24 basis for the Court's opinion.

25 And the only thing that that video and that thumbnail

1 picture from the video tie Mr. Sandmann to is that  
2 confrontation. Because the thumbnail shows Phillips,  
3 Sandmann, staring at each other. That's the function of that  
4 video. It shows that was the person staring at Mr. Phillips.

5 All of the other statements in the article about tomahawk  
6 chops and build the wall that are attributed to students, that  
7 picture doesn't tie Mr. Sandmann to those statements at all.  
8 And so that's why I say, these videos don't change anything  
9 about the Court's rulings, because the Court said that  
10 statement 10 was about Mr. Sandmann, and the videos don't show  
11 that any of the other statements were about him. So the video  
12 doesn't change anything.

13 The second category of statements -- of amendments  
14 rather -- are amendments relating to the editor's notes.  
15 They've now alleged in their complaint all these editor's  
16 notes. Those editor's notes don't have anything to do with  
17 whether or not the statement about being blocked isn't a  
18 matter of opinion or not. They don't have anything to do with  
19 whether or not these articles were defamatory.

20 THE COURT: They have to do with whether they were  
21 inaccurate.

22 MR. BAINE: To some degree, yes. But not in any way  
23 that matters for this motion.

24 THE COURT: Because, as I recall -- I've got five  
25 cases now about this. But as I recall, in this case, they



1 said that Sandmann was standing there and more or less implied  
2 that he had walked up to Phillips when actually it was -- and  
3 the boys had approached Phillips. But actually it was  
4 Phillips that approached the boys, which is what I understand  
5 the editor's notes to make clear.

6 MR. BAINE: Well, I don't know that the editor's  
7 notes do that.

8 THE COURT: I have a lot of paper here. I have  
9 notes --

10 MR. BAINE: I don't recall if the editor's notes  
11 addressed that specific thing, but I'd like to go through a  
12 couple of the editor's notes to explain the way I view them.

13 THE COURT: Go ahead.

14 MR. BAINE: The editor's notes were not labeled  
15 corrections. One of them was, and I'll get to that; but for  
16 the most part, they're not labeled corrections. They're  
17 labeled editor's notes, because they were not correcting, for  
18 the most part, misstatements in fact.

19 The first editor's note -- and this is in paragraph 221  
20 of the amended complaint. But it makes clear the difference  
21 between an editor's note and a correction. It said there had  
22 been a correction the week before of the incorrect fact that  
23 Phillips had fought in the war. That was a mistake, and that  
24 was subject to something called a correction.

25 But this was different. This is called an editor's note.

1 And here's what it says. It says, "Subsequent reporting, a  
2 student's statement, and additional video allow for a more  
3 complete assessment of what occurred." "A more complete  
4 assessment of what occurred."

5 That doesn't say those are factual falsehoods. An  
6 opinion can be subject to more complete assessment just as a  
7 statement of fact can. That's not necessarily a statement  
8 there was a factual error.

9 Then the note continues, and it says that the subsequent  
10 reporting and the students' statements and additional video  
11 either contradicted or failed to confirm accounts provided by  
12 Phillips and others, including the following: That Phillips  
13 was prevented by one student from moving on.

14 The note explained that the high school student,  
15 Mr. Sandmann, facing Phillips, had issued a statement  
16 contradicting his opinion, giving his different assessment of  
17 what had occurred. That's not an admission of factual error.  
18 It's the reporting that, as the Court said, that Sandmann and  
19 Phillips had different perceptions of what had occurred.

20 What Sandmann said himself in his public statement is  
21 interesting. He says, "I never felt I was blocking the Native  
22 American protester." That's a quote. "I never felt" I was  
23 blocking him.

24 That sure sounds like just what the Court has said. Sure  
25 sounds like an opinion. That was his perception. "I never

1 felt that." Not that's a false statement of fact.

2 The other things that the editor's note updated or  
3 provided additional information relating to were the  
4 statements that the group had been taunted in the lead-up to  
5 the encounter.

6 The problem with that sentence was the timing. Lead-up  
7 was wrong. The group hadn't been taunted in the lead-up to  
8 the encounter. It was after the encounter began. So there  
9 was a timing issue there.

10 THE COURT: Which group are we speaking of now?

11 MR. BAINE: Beg your pardon?

12 THE COURT: I'm sorry. Which group are you saying  
13 had been taunted? The Israelites or the boys or the Indians?

14 MR. BAINE: The initial article says that Phillips'  
15 group had been taunted in the lead-up to the encounter. In  
16 fact, they were taunted after the encounter began. That was a  
17 mistake in after or before. But that has nothing to do with  
18 this claim of defamation.

19 The third thing that the Post --

20 THE COURT: Does your article say that Sandmann  
21 taunted them --

22 MR. BAINE: No, it didn't say that.

23 THE COURT: -- the Native American group?

24 MR. BAINE: The article did not say that Mr. Sandmann  
25 taunted anybody. It only said that he didn't move and that he

1 arguably blocked him. All the statements about taunting were  
2 attributed to students, the teens, some students, never  
3 connecting Mr. Sandmann.

4 So then we get to the group liable problem that when you  
5 have a big group and you say, well, some of them were  
6 taunting, you can't assume that any particular person was  
7 taunting.

8 The editor's note says that all the subsequent reporting  
9 failed to confirm that the students were trying to institute a  
10 conflict. Now, remember, that was another thing that the  
11 Court said was an opinion. That was an opinion expressed by  
12 one of the Native American protesters based upon his  
13 observation that there was a rambunctious and aggressive  
14 display going on.

15 Since then, Mr. Sandmann had issued a statement saying  
16 they weren't trying to instigate a conflict. So the Post  
17 responsibly did an editor's note saying, well, subsequent  
18 reporting, Mr. Sandmann's statement contradicts this opinion  
19 of this Native American protester's that the students were  
20 trying to instigate a conflict. Different perspectives  
21 offering different opinions on what was going on.

22 The version of the note that appears in the newspaper  
23 also addressed the last article. And here's what it says by  
24 way of editor's note. "The story reported denial of one  
25 student," Mr. Sandmann, "that he's heard any student say

1 anything hateful or racist at any time. The story should have  
2 noted that widely circulated video from that day does not  
3 corroborate that such statements were made."

4 So that's not correcting some false statement of fact.  
5 It's just saying it's additional information that confirms  
6 Mr. Sandmann's statement that he didn't hear anything.

7 The next note in paragraph 224 of the amended complaint  
8 was a correction, not an editor's note. That was because the  
9 Post was correcting a mistake. It had reported the diocese  
10 had apologized for the students' actions. The correction said  
11 it had not apologized. It had condemned their behavior but  
12 had not apologized. So they corrected that misstatement.

13 And then I think another editor's note explained that the  
14 Philip Bump column had been revised to delete references to  
15 public perceptions, based upon the initial video, that the  
16 student facing Phillips appeared to physically intimidate him.  
17 A more complete video does not show that the student  
18 physically intimidated Phillips.

19 This is obviously referring to public perceptions. So  
20 they deleted the reference to public perceptions based upon  
21 video that were negated by subsequent video.

22 Well, public perceptions are opinions based upon  
23 disclosed facts and available video, not a correction of  
24 factual error.

25 Then finally, the editor's note on the last article

1 says -- this is the one that's entitled "Viral Standoff is  
2 More Complicated Than It First Seemed." It refers to  
3 subsequent coverage and noted the article had been revised --  
4 this is a quote, "revised to clarify that certain statements  
5 are not corroborated by widely available video of the  
6 incident."

7 Again, that does not indicate that any of the statements  
8 challenged in this lawsuit were factual mistakes as opposed to  
9 opinions. But the Court has given multiple grounds for  
10 rejecting the claim based upon each of the statements in these  
11 articles. And our view is that none of those grounds has been  
12 affected by either the editor's notes or the video.

13 So the third category of amendments are a whole bunch of  
14 paragraphs about Mr. Phillips' credibility, which they do say  
15 in their brief, at one point, bear upon the issue of  
16 negligence. And if this case were ever to go to trial and the  
17 issue were whether the Post reasonably relied upon a factual  
18 statement Mr. Phillips made or whether they had reckless  
19 disregard for truth, I suppose we can get into Mr. Phillips'  
20 credibility.

21 But as the plaintiff acknowledges -- well, maybe they  
22 don't acknowledge it. Even if these were statements of  
23 opinion, as the plaintiff says, they say the Post is liable  
24 for failing to disclose facts that bore upon Mr. Phillips'  
25 credibility. That's why they think this is relevant. They

1 feel that they've now alleged facts that show that he was not  
2 reliable and that's important because the Post should have  
3 disclosed those facts.

4 Well, the law doesn't require the Post to disclose facts  
5 bearing upon the credibility of the person's opinion that's  
6 being reported. The reader can judge that opinion based upon  
7 the facts that are offered to support the opinion. There's no  
8 case anywhere that says an opinion becomes actionable because  
9 the person that reports it doesn't talk about the credibility  
10 of the person who offered the opinion. That's just not the  
11 law.

12 It's obvious, though, that Mr. Phillips was an antagonist  
13 of Mr. Sandmann. He was at a standoff with Mr. Sandmann.  
14 Obviously, he's not a supporter of Mr. Sandmann. So the  
15 reader knew that about Mr. Phillips. He wasn't a neutral  
16 third party. He was a participant in the whole incident. And  
17 so they know that, well, we can take that into account in  
18 assessing his credibility.

19 And all these other allegations about Mr. Phillips are  
20 primarily to the effect that, oh, he protests a lot and he's  
21 always on the leftist side of causes. He's protested against  
22 the pipeline. He's talked about healthcare. He's always off  
23 on the left.

24 Well, I'm not sure what that has to do with credibility  
25 to begin with, but it certainly doesn't bear upon whether the

1 Post has some obligation to disclose more facts about him.  
2 And, in fact, they did disclose that he'd been involved in  
3 previous protests. So if that's what the reader needs to  
4 know, they knew that from the Post article.

5 And then finally, I should say one thing. Counsel didn't  
6 touch on it here but --

7 THE COURT: I think the point -- I've been over this  
8 proposed amended complaint several times. The point they're  
9 trying to make with discussing Phillips is they're trying to  
10 rebut what the Court said that it was an opinion that he was  
11 being blocked, and they're saying it wasn't his opinion; he  
12 was lying. He knew he wasn't being blocked. That's what I  
13 understand that amendment to be driving at.

14 MR. BAINE: That is -- that is the argument I was  
15 about to address, and it's one of the things that they say in  
16 their papers.

17 THE COURT: Because if you allege somebody's lying  
18 and it's not really his opinion, maybe that opinion rule won't  
19 fly. That's their argument.

20 MR. BAINE: Right.

21 THE COURT: I'm not sure it's correct, but that's  
22 their argument.

23 MR. BAINE: But they cite no cases to support that,  
24 and we cite two cases that dispose of that argument.

25 In the *Milkovich* case, Supreme Court case involving an



1 opinion by Chief Justice Rehnquist, here's what he says in  
2 Footnote 7. "The issue of falsity relates to the defamatory  
3 facts implied by a statement of opinion. For instance, the  
4 statement, 'I think Jones lied' may be provable as false on  
5 two levels. First, that the speaker really did not think  
6 Jones had lied but said it anyway. And second, that Jones  
7 really had not lied. It is," the Chief Justice says, "the  
8 second level of falsity which would ordinarily serve as the  
9 basis for a defamation action." In other words, the substance  
10 of the statement, not whether or not the speaker really  
11 believed the opinion.

12 That's what Chief Justice Rehnquist is saying in Footnote  
13 7. He says, if they didn't really believe the opinion, that  
14 might bear upon malice, if that's an issue, but it's false as  
15 to the underlying statement here that Phillips was blocked --  
16 that Sandmann was blocked. That's either a false statement of  
17 fact or it's an opinion, but whether or not Mr. Phillips  
18 really believed he was blocked is not the basis for a lawsuit.

19 In the *Hammer v. City of Osage* case in the Eighth  
20 Circuit, the Court said, "Statements of opinion, even if made  
21 maliciously or insincerely, are afforded absolute privilege  
22 under the free speech clause of the First Amendment and cannot  
23 be made actionable libel." "Even if made insincerely or  
24 maliciously." And if the law were otherwise, every person who  
25 misstates an opinion would be subject to sue based upon the

1 allegation that he didn't really hold the opinion.

2 Look at restaurant reviews. Everybody knows classically  
3 restaurant reviews are opinions; they can't be the basis for a  
4 libel suit. Well, if the plaintiff's argument were correct,  
5 they could come to court and say, well, the restaurant  
6 reviewer didn't really believe the substance of his opinions.  
7 I can sue and prove as a fact that he didn't believe it.

8 Every public opinion of any kind can be the basis for a  
9 libel suit, and we would then have you plumbing the depths of  
10 people's souls and minds to find out, gee, do they really  
11 believe what they said or are they saying it for some ulterior  
12 purpose.

13 How can we impose liability on the ground that, well, we  
14 really think that he's got some hidden agenda? Everybody  
15 knows what Mr. Phillips' agenda was on the mall. He was  
16 protesting for Native American recognition and respect.  
17 Everybody knows that he was in a face-to-face confrontation  
18 with Mr. Sandmann. And he wasn't Mr. Sandmann's ally. He was  
19 his adversary. Everybody knows that.

20 He expressed his opinion about how he felt in that  
21 incident on the mall, and the Post reported his opinions and  
22 reported the facts that proved -- that supported that opinion  
23 in Mr. Phillips' mind.

24 The readers can judge that, whether or not that opinion  
25 is sound or not sound. They have Mr. Sandmann expressing his

1 position. I didn't feel -- I didn't think that I was blocking  
2 him in any way. But to argue simply that the person who  
3 expresses these opinions is not a credible source and,  
4 therefore, the Post can't report his opinions would tie every  
5 reporter's hands in reporting on every incident, every  
6 political demonstration that they cover. They'd have to talk  
7 to the participants. They're all giving their perceptions.  
8 Then the Post would have to say, well, I wonder whether that  
9 person really believes that. Maybe they didn't really believe  
10 it.

11 There's no case that suggests that that can be the basis  
12 for liability. The sub-suit of the alleged defamation is the  
13 opinion itself. And if it's an opinion, it's not actionable.  
14 If the facts are disclosed, people can look at the facts and  
15 look at the opinion and weigh it.

16 Finally, I know I've taken a lot of time --

17 THE COURT: You're right on time.

18 MR. BAINE: -- but they have argued that the Court  
19 failed to consider the context of these articles, and I think  
20 that's an unfair criticism. The Court considered the entire  
21 context and said in its opinion, I'm looking at these  
22 statements in the context of the entire article.

23 They say that -- let me just look at my notes here for a  
24 second. I wanted to find a point.

25 Oh, they argue that part of the context is the Make

1 America Great hat. Well, Mr. Sandmann was wearing the hat.  
2 So if the hat is the context that turns everything into a  
3 racist statement, that's true. He was wearing the hat.

4 And the Court considered the context of the article in  
5 its entirety. They want you to consider things that aren't in  
6 the article. And to the extent they're asking you to consider  
7 context outside the article, those are extrinsic facts.  
8 That's a libel per quod claim. It's not a libel per se claim.

9 And if they're asking you to consider context outside the  
10 four corners of the article, they have to allege special  
11 damages, which they have not done. They're not arguing that  
12 they've alleged special damages, even in the amended  
13 complaint. And we've explained in our brief why they have  
14 not.

15 Finally, they say that the Court should look at the  
16 comments on the Post website to tell the Court how to  
17 interpret the article. Well, it's the Court's job, as a  
18 matter of law, to decide how the article can reasonably be  
19 understood by an average reader. And the Court applies its  
20 judgment and its experience to decide whether or not it would  
21 be reasonable to read an article to mean certain things.

22 The Court doesn't do that by asking what a self-selected  
23 group of commenters on the Internet might have said. For one  
24 thing, the people who comment don't say, I interpret the  
25 article above to mean X. They generally go off and launch

1 into their own opinions, based upon their own preconceptions  
2 and they're own biases.

3 They're not purporting to tell anybody what that article  
4 I just read means. They're giving their take on the whole  
5 issue. And even if they did say, I think that's what the  
6 article means, it's for the Court to decide whether that's  
7 reasonable.

8 And the reality is that these commenters, we don't know  
9 whether they've read the whole article at all, whether they  
10 went beyond the headlines. We don't know whether they saw  
11 some video on the Internet and then saw a Post headline and  
12 decided to write, comment, without reading any of the article.  
13 That's why the Court does this on its own asking itself how  
14 could a reasonable reader interpret this article.

15 THE COURT: Well, here's the heart of the assessment.  
16 If I take the pictures of Mr. Sandmann that he can be  
17 identified with most of the public, what I see as the main  
18 thing is about Phillips, these new allegations about Phillips.

19 They allege, as I understand it, that Phillips knew darn  
20 well that he had a way to retreat when he said "I didn't have  
21 a way to retreat," and he knew that he wasn't really being  
22 blocked. This is additional stuff that wasn't in the original  
23 complaint. And that's the allegation. It has to be proved.  
24 If we reopen the case, it has to be proved. But it's an  
25 allegation. It's a new allegation.

1 MR. BAINE: Well, but there's a question of law for  
2 the Court to decide, Your Honor, whether or not one can state  
3 a claim, based upon an opinion, on the ground that the person  
4 expressly didn't really believe that opinion.

5 It doesn't alter -- the new allegations about  
6 Mr. Phillips' credibility don't alter in any way the nature of  
7 the statement. The Court has said that certain parts of that  
8 statement, such as "didn't move" are facts, but the assessment  
9 that someone was blocked is a perception or an opinion by its  
10 nature.

11 If, by its nature, it's an opinion, it's not actionable.  
12 And the allegation that Mr. Phillips didn't really believe it  
13 doesn't transform it into a statement of fact. It's still a  
14 statement of opinion. And it's the substance of the opinion  
15 that is arguably hurtful. But it can't be false because it's,  
16 by its nature, a matter of perception.

17 THE COURT: If he says, I had no way to retreat, I  
18 wasn't allowed to retreat, and if you had a broader view of  
19 it, there is plenty room for him to retreat --

20 MR. BAINE: Well, Your Honor --

21 THE COURT: I had a very narrow picture of it when I  
22 made that statement at the conclusion of the first opinion;  
23 that he was standing there and they wouldn't get out of his  
24 way if he says excuse me. That's when he said there was no  
25 reasonable way to retreat; it was too crowded or too steep or

1 whatever that he couldn't retreat.

2 But if they came up with a video that shows that he had  
3 plenty of room to retreat, I would say that they've shown a  
4 false statement.

5 MR. BAINE: Well, Your Honor --

6 THE COURT: And then the Post -- there would be a  
7 jury issue, of course. It would be a jury issue whether the  
8 Post was negligent in that case when they allege all the other  
9 new stuff that they've got in there.

10 MR. BAINE: Well, on that particular statement that I  
11 couldn't retreat, as I said, the first article, reading that  
12 in context makes clear he was able to retreat because it said  
13 it ended when he walked away. And so you have to read that in  
14 its entirety and then it's obvious that Phillips was engaging  
15 in, I would say, rhetorical hyperbole, which is, by its  
16 nature, opinion.

17 He wasn't literally saying, I could not move in any  
18 direction because the article says he moved away. And even if  
19 that's what he could be understood to mean, the Post said  
20 unequivocally, as a fact, not qualified in any way, that he  
21 ended the confrontation by walking away.

22 So he was able to walk away. He was able to retreat.  
23 And the Post did not say otherwise.

24 Even if one considered that as a factual statement by  
25 Phillips that I couldn't walk away, the Post then says he did

1 walk away. So the Post did not publish that he could not at  
2 all walk away.

3 So I think, read in context, he is saying, I felt  
4 blocked. I couldn't move on. I couldn't move forward. I  
5 think what he probably meant was, I couldn't move forward  
6 rather than I couldn't go away, because he did go away.

7 The Post cannot be responsible for the meaning that he  
8 couldn't move at all because it said he decided to walk away.

9 THE COURT: Well, he didn't go away because somewhere  
10 in this record it said this is all going on and somebody told  
11 the boys, come on, the bus is here, get on the bus, and the  
12 boys went and got on the bus.

13 MR. BAINE: Well, Your Honor --

14 THE COURT: And I guess somebody in the indigenous  
15 people's crowd said, "We won. We won." And the boys went  
16 home. It's alleged someplace the boys went home, didn't even  
17 know all this was going to hit the fan.

18 MR. BAINE: Your Honor, with respect, I think  
19 you're --

20 THE COURT: When they got home, they found all this  
21 stuff on the media and other things that had been described.

22 MR. BAINE: With respect, I think you're blurring  
23 together what we learned later on, what Mr. Sandmann said  
24 later on, what he says now in his complaint, and what the Post  
25 said in the first article.



1           The Post said unequivocally in the first article that the  
2           confrontation ended when Mr. Phillips walked away, not when  
3           someone said, hey, the bus is here; it's time to go. That's  
4           what people said later on.

5           THE COURT: I don't know how important that is.

6           MR. BAINE: And this statement about being blocked  
7           only appears in that first article. By the time we get to  
8           subsequent reporting by the Post, the Post doesn't say blocked  
9           at all. It just says neither budged.

10          But I would refer the Court to the article. The article  
11          that contains the word "blocked" has to be read in its  
12          entirety. And that article says that the whole thing ended  
13          when Phillips and his group walked away. It said nothing  
14          about it ended when the boys decided to leave because buses  
15          came.

16          So you have to look at the article itself as a whole, not  
17          what someone said some days or weeks later. The question is  
18          whether or not the person read that article, who knows from  
19          that article that Phillips, in fact, was able to and did walk  
20          away. That's the context of his rhetorical statement that I  
21          couldn't retreat.

22          THE COURT: Okay.

23          MR. BAINE: Thank you, Your Honor.

24          MR. WOOD: May I argue for our ten minutes, Your  
25          Honor?

1 THE COURT: Yeah, go ahead.

2 MR. WOOD: Thank you.

3 Mr. Baine says -- and this is a quote -- "I think what he  
4 meant was." Your Honor is trying to look at these various  
5 videos to figure out what was Phillips saying. The problem  
6 is, the only way to answer that question is to depose  
7 Mr. Phillips.

8 One of the reasons that we believe this case has to go  
9 beyond motion to dismiss is because it needs a fully developed  
10 factual record. Because under defamation law, Your Honor, you  
11 just don't see a term and go, that's opinion. You have to  
12 look at the factual circumstances to determine whether the  
13 speaker -- in this instance, Mr. Phillips -- was expressing an  
14 opinion or whether Mr. Phillips was expressing a factual  
15 narrative. That's a jury issue, unless the evidence is  
16 overwhelming on motion for summary judgment where it could be  
17 decided by the Court.

18 And I have to admit, Judge, I've done a lot of defamation  
19 work. This does sound confusing. It's not. Here's what  
20 happened.

21 There is about a one-minute video clip that went viral.  
22 There were other longer videos out there, but that was not  
23 what was getting played in the media. That was not getting  
24 what was posted on the Washington Post articles. It was just  
25 the one-minute clip that shows, as Your Honor noted, Nicholas

1 standing with Nathan Phillips pounding the drum in front of  
2 him.

3 What happened before? What happened afterwards? That  
4 video doesn't tell us anything.

5 But here's what happened to Nicholas. At the time that  
6 video of one minute went viral, Nathan Phillips hit the  
7 airwaves. Nathan Phillips was on CBS, talking to ABC, talking  
8 to NBC, talking to the Washington Post; and he was telling  
9 them, this is what happened.

10 Now, his stories changed. His factual narrative changed.  
11 He wasn't believable. But they post articles republishing his  
12 factual narrative of what happened. "He blocked me. I was  
13 intimidated by him. He was taunting me."

14 You can't label that opinion unless you know, under the  
15 evidence, what Mr. Phillips was intending to convey. And I  
16 believe the evidence, if we're allowed to develop it in a  
17 fully developed record, will be such that a jury could easily  
18 find that Mr. Phillips was intending to convey facts. And  
19 even the Washington Post, in their notes, has admitted that  
20 fact.

21 Instead of talking about what they say, let me just read  
22 to you three or four of what the Post notes say.

23 Subsequent reporting. That would be investigation. "A  
24 student statement and additional video allow for a more  
25 complete assessment of what occurred."

1 "Either contradicting or failing to confirm accounts  
2 provided in that story, including that Native American  
3 activist Nathan Phillips was prevented by one student from  
4 moving on, that his group had been taunted by the students in  
5 the lead-up to the encounter, and that the students were  
6 trying to instigate a conflict."

7 The Post went in after the fact, after we sent them a  
8 retraction demand, and they said that part of Mr. Phillips'  
9 narrative is not true.

10 There's no such thing as a false opinion. This is not  
11 what Mr. Baine said, we're trying to sue them because they  
12 republished a false opinion that Mr. Phillips didn't believe  
13 was false. That's nonsense.

14 This young man wears a MAGA cap. You may look at him and  
15 you may see racist. Others may see Make America Great Again;  
16 I love my country. That's an opinion.

17 We're not here because of people's opinions about the  
18 caps. We're here because whatever color cap he was wearing,  
19 if it was plain white, Mr. Phillips went out and told a  
20 factual narrative that this young white student, with a white  
21 cap let's say, got in front of him to instigate a conflict,  
22 blocked his way, while he was being subjected as a Native  
23 American to taunting and being blocked so that he couldn't get  
24 away from the taunting. And that describes a boy, in that  
25 instance, wearing a white cap, as someone who is engaging in

1 racist misconduct.

2 We wouldn't tolerate having any young white person get in  
3 front of a Native American, block his way, not let him retreat  
4 while he's taunting him and jeering him. That was the  
5 narrative factually of Nathan Phillips. It's not the truth.  
6 Nathan Phillips is a liar.

7 And they published his lies. They published his  
8 narrative. Because they didn't take the time to go back and  
9 look at what happened before or what happened afterwards.  
10 They just took the one-minute clip and republished the  
11 description factually of Nathan Phillips. That's why they're  
12 sued, because to do that without investigation was negligent.

13 This case is only in front of you, Your Honor, to  
14 determine whether the lawsuit, lengthy as it is, whether it  
15 sets forth a plausible cause of action for the negligent  
16 republication of false and defamatory statements.

17 They admitted in the other notes, taunting they proved  
18 was not true. That was false. Blocking him, not true. That  
19 was false. Physically intimidating, more complete videos,  
20 does not show that the students physically intimidated  
21 Phillips. They have admitted that the factual narrative --

22 THE COURT: What were you just reading from?

23 MR. WOOD: I'm reading from the -- I can cite them,  
24 Your Honor. It's the editor's notes from the Washington Post.

25 THE COURT: Okay.

1 MR. WOOD: In those notes, what the Post did, after  
2 we sent them a retraction demand, over a month and a half  
3 after the event, is they went out and investigated the factual  
4 narrative of Nathan Phillips. They should have done that  
5 before they published it.

6 But when they finally got around to looking into the  
7 factual narrative of Phillips about taunting and intimidating  
8 and blocking, they admitted that it was false, in part because  
9 they finally took the time to look at the before video that  
10 was available but undisclosed by them and the after video.

11 This is not about Nathan Phillips' opinion, Your Honor.  
12 If he can somehow, in his testimony, convince the Court or a  
13 jury that he was merely giving his opinion, well, more power  
14 to him.

15 I think anyone will easily see that Nathan Phillips was  
16 out on television and in news broadcasts talking about his  
17 recollection of what happened that day. And that is factual.  
18 It either happened or it didn't happen. And we now know and  
19 the Washington Post admits it didn't happen.

20 Yet they took that false narrative of Phillips and used  
21 it to convey a gist that this young boy was engaged in racist  
22 misconduct. Not because he's wearing the hat. That might  
23 have been the straw that broke Jeff Bezos' back and said let's  
24 run with this story because of the cap. But that's not what  
25 this case is about.

1           This young boy was accused of racist misconduct, blocking  
2           a Native American, jeering at him, taunting him, physically  
3           intimidating him. That's the gist of their articles in the  
4           four corners of the articles. And it is a gist that is based  
5           on false factual statements by Nathan Phillips.

6           So it's not an opinion case, Your Honor, unless  
7           Mr. Phillips can convince a jury that he went on all these  
8           television networks to give his opinion. I bet you that -- I  
9           bet you when NBC's asked or CNN, why did you interview Nathan  
10          Phillips, I bet when I ask the reporter from the Washington  
11          Post, why did you interview Nathan Phillips, to get his  
12          opinions? No.

13          They interviewed Nathan Phillips repeatedly to get the  
14          facts, as he allegedly gave them. Facts that turned out to be  
15          like shifting sand, changing from interview to interview,  
16          which ultimately, even the defendant admits, his factual  
17          narrative was false.

18          That's why it's important for this young man to have not  
19          just a day in court. Your Honor has recognized the magnitude  
20          of this case to the public in general. The magnitude of the  
21          case that I care about is Nicholas Sandmann, a young boy who  
22          aspires to be a lawyer. I don't believe --

23                 THE COURT: After he sees this case, he may change  
24          his mind.

25                 MR. WOOD: Or he may be inspired to fight for

1 justice.

2 But, Your Honor, I make that point only because -- and I  
3 know enough to know about the demur practice.

4 THE COURT: What?

5 MR. WOOD: They used to practice law by filing  
6 demurs, and you would get lawsuits thrown out because they  
7 didn't meet a technical pleadings requirement. The Civil  
8 Practice Act and the Federal Rules of Civil Procedure came  
9 along and they said, we're going to have a broad scope for  
10 amendments because we're not going to have cases thrown out on  
11 technical issues like a demur because somebody didn't plead  
12 right.

13 He just wants the Court to look at his lawsuit, as best  
14 he can develop it before discovery, and say, you know what, if  
15 you can prove all this, it's plausible. You set out a  
16 plausible case for the negligent republication of false and  
17 defamatory statements, and now you get to move on,  
18 Mr. Sandmann.

19 Because at the end of the day, what we really want for  
20 Nicholas Sandmann is we want a final ruling on this case,  
21 whether it be by Your Honor or by a jury. We want it to be  
22 decided on a fully developed factual record.

23 We do not want it to be decided on what Mr. Baine thinks  
24 that Nathan Phillips was trying to say or what Joe Blow said  
25 in a comment. We want to go to the principals; Nathan



1 Phillips, the eyewitnesses, the reporters. We want to get the  
2 facts and fully develop the facts.

3 And then, and then only, whether he wins or whether he  
4 loses, he will have the satisfaction of knowing, win or lose,  
5 that at least this Court, and hopefully, I believe, a jury,  
6 will reach its decision based on a fully developed factual  
7 record.

8 This case should not be thrown out on motion to dismiss.  
9 The original complaint should not have, in my opinion. The  
10 amended complaint, we think, makes it abundantly clear that we  
11 should move this case to discovery. Not to the Sixth Circuit,  
12 but to discovery.

13 Thank you, Your Honor.

14 THE COURT: All right.

15 MR. BAINE: May I have 30 seconds, Your Honor?

16 THE COURT: Pardon me?

17 MR. BAINE: May I have 30 seconds?

18 THE COURT: Thirty seconds. I'll time you.

19 MR. BAINE: Got it. I just want to direct the Court  
20 to two of its holdings in its opinion which I think are  
21 unchanged.

22 At page 17, the Court wrote that whether Mr. Phillips  
23 was, quote, blocked "is simply not capable of being proved  
24 objectively incorrect" by the nature of this statement. I  
25 think that holding stands. It is unaffected by any evidence

1 or additional allegations.

2 Secondly, the Court said on page 22, "The article quotes  
3 Phillips, who stated that an individual in a hat 'blocked' his  
4 path and we were at an impasse." The Court went on to say  
5 there's nothing defamatory about that.

6 So there were two alternative grounds for holding that  
7 the blocking statement was not actionable. One, it was an  
8 opinion by its nature. Not that Mr. Phillips intended  
9 opinions, but by its nature, it stated opinion. And secondly,  
10 there's nothing defamatory about suggesting that, in the  
11 context of a rambunctious, three-sided confrontation, two  
12 people are at an impasse where one blocked the other. Just  
13 not defamatory.

14 Thank you.

15 THE COURT: All right. Well, get those DVDs to me,  
16 and I'll get you -- it's going to take me several days, at  
17 least, but I'll get you a decision on this as quick as I can.

18 Again, my compliments to both sides, which makes my job  
19 difficult.

20 (Proceedings concluded at 2:23 p.m.)  
21 - - -

22 C E R T I F I C A T E

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

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

October 21, 2019  
Date of Certification