LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

MONDAY, AUGUST 28, 2023

GUEST COLUMN

6th Circuit's *Sandmann* ruling blurs the distinction between fact and opinion

By Krista L. Baughman

The 6th Circuit recently affirmed the dismissal of defamation claims filed by "Covington kid" Nicholas Sandmann against several media companies that published statements made about him following a January 2019 encounter on the steps of the Lincoln Memorial. Rather than evaluating whether the articles about Sandmann were substantially true or published with actual malice – the typical approach in lawsuits against news outlets – the 6th Circuit held that the articles were opinion instead of objectively verifiable fact, in a decision that is likely to pave the way for future abuses of the opinion doctrine. *Sandmann v. New York Times Company*, –F.4th– (6th Cir. August 16, 2023).

While most defamation plaintiffs lack extensive documentary evi-dence proving falsity, the *Sandmann* record included eighteen video recordings capturing the incident from numerous angles. *See Sandmann* at *11 (dissent, FN3). The videos show a 16-year-old Sandmann wearing a red "Make America Great Again" hat, standing on the Lincoln Steps surrounded by his fellow Covington Catholic High School classmates and others. A man, Nathan Phillips, walks through the crowd beating a drum and singing a song. Several people move out of his way until he reaches Sandmann, who stays put. Phillips stands face to face with Sandmann and continues to sing and beat his drum, and Sandmann does not move. This encounter lasts several minutes, after which Sandmann walks away. Phillips continues his song for another minute, and then stops, to the cheers of some onlookers.

In media interviews following this interaction, Phillips claimed that he and Sandmann "were at an impasse," that Sandmann had "blocked [Phillips's] way and wouldn't allow [him] to retreat," and that Sandmann had "slided" [sic] to the right such that he "stopped [Phillips's] exit." Sandmann at *2-3. Based on "blocking" statements like these, Sandmann sued several media outlets, arguing that the videos showed Phillips's narrative to be false.

On appeal, the 6th Circuit considered whether, under Kentucky law, the blocking statements connoted objectively verifiable facts as necessary to support a defamation claim, or whether they were Phillips's opinions. The court noted that while an opinion can be defamatory if it implies that it is based on undisclosed defamatory facts, an opinion is protected "if it is clear from the context that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated." Sandmann at *7 (citations omitted). The court acknowledged that because video recording of the incident existed, the court must "view the facts in the light depicted by the videotape." *Id.*, citing *Yancey v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1989).

The 6th Circuit found the challenged statements to be protected opinion, holding that when Phillips described Sandmann as "blocking" him, he was not describing the physical positioning of the two men on the Lincoln Steps, but instead was expressing his subjective interpretation of Mr. Sandmann's intent. The majority reasoned that Phillips had told the press that his goal was to "find…an exit out of this situation," and that "based on Phillips's perception of Sandmann's reaction to his attempt to leave the area," Phillips felt that Sandmann "blocked" him. Accordingly, the statements were Phillips's own opinions and were protected, regardless of "[w]hether or not a video shows Phillips attempting to move around or away from Sandmann." Sandmann at *9.

According to the majority, the words used by Phillips – "impasse," "blocked," "allowed," "retreat" – could be either "literal or figurative," and therefore did not require assessment as statements of objective fact. The court also noted that because the statements "appeared in stories that provided multiple versions and descriptions of the events," reasonable readers were on notice that Phillips's statements were merely his own perspective. *Id.* at 18.

Yet none of the news stories stated that Phillips was expressing his own subjective thoughts as opposed to an eyewitness account of his physical confrontation with Sandmann. As Judge Griffin noted in an 18-page dissent, "[w]hen describing Sandmann's physical actions, Phillips never used qualifying terms like 'I think' or 'it seemed' or 'I felt' that would have suggested he was relaying his perceptions, feelings, or opinions." Sandmann at *21. The dissent criti-

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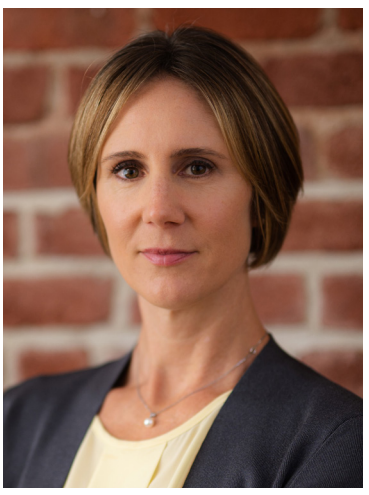

cized the majority for "rewrit[ing]" the news stories, failing to "constru[e] the text of [Phillips's] statements with their plain meaning," and ignoring "the video evidence [that] conclusively demonstrates that Phillips's narrative is indeed 'blatantly and demonstrably false.'" *Id.* at 20-21.

The dissent's points are valid, as Phillips's statements do not fit in any of the recognized categories for protected opinion. The statements were not comprised of "loose" or "figurative" language such as to be obviously subjective (e.g., "John Doe is an idiot"). *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 21 (1990). They were not concerned with an inherently subjective value judgment and therefore impossible to prove false with evidence (e.g., "John Doe is a racist"). As noted above, they were not "couched in qualifying terms" – either by Phillips himself or the news outlets that quoted him – to suggest they were his opinions. *Williams v. Blackwell*, 487 S.W.3d 451, 453, 455-56 (Ky. Ct. App. 2016). And the language used by Phillips – blocking, retreat, etc. – are common words with widely accepted definitions that would enable a jury to decide the truth or falsity of Phillips's allegations.

The majority's creative interpretation of the line between fact and opinion creates a slippery slope that will undoubtedly be used by defendants to obscure the protected opinion doctrine in their favor. Consider a related hypothetical: after a bad date, one dater posts on social media that her date had "trapped" her at a restaurant. Should a court immunize her statement from liability by casting it as merely her opinion, despite restaurant security footage confirming that she had been physically unrestrained and free to leave at any time?

Ultimately, if the protected opinion doctrine is to maintain its integrity and usefulness, courts need to abide by the guardrails set by decades of case law and avoid creating inferences that do not appear from the face of the language. The alternative is defamation law that bends flexibly to the whims of the court, irrespective of facts and law – an outcome that should frighten us all.