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Protecting Opinion in Twitter's 'Schoolyard Squabbles'

Stephen M. Kramarsky, New York Law Journal

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Over the last few decades, technology has fundamentally changed the way people create, consume and understand information. With that change has come a shift in the way we understand core concepts like "facts" and "truth." In November 2016, New York Times technology journalist Farhad Manjoo, in an article titled "How the Internet Is Loosening Our Grip on the Truth," wrote: "Digital technology has blessed us with better ways to capture and disseminate news … . You would think that greater primary documentation would lead to a better cultural agreement about the 'truth.' In fact, the opposite has happened."

That's a pretty strange idea for a lawyer to deal with—that we, as a society, can't agree anymore on what constitutes a "fact." But for anyone who lives or works in a media-saturated environment, Manjoo's observation probably rings true. His article was recently cited by New York State Supreme Court Justice Barbara Jaffe in *Jacobus v. Trump*, 2017 WL 160316, at *1 (Sup. Ct. N.Y. Cnty. Jan. 9 2017), a case that turned on that very issue: How should a reasonable person understand the information he or she reads on social media and the Internet?

Whether or not society can come to consensus on the line between fact and opinion, the distinction has real, legal consequences. In defamation law, a false statement of fact may be actionable; but a statement of opinion, no matter how offensive, generally is not. And this distinction is more than skin-deep. For instance, statements that appear to be opinion may nevertheless be actionable (as "mixed opinion") if they *suggest* that they are based on unstated facts.

The analysis can be very complex and fact specific, depending not only on the words at issue, but also the context in which they were used. But at the same time, the fact-opinion distinction is a question of law that courts can resolve on a motion to dismiss. The opinion in *Jacobus v. Trump* is an excellent example of how complicated that analysis has become in the era of pervasive digital information.

Background

On April 19, 2016, Cheryl Jacobus sued then-candidate Donald J. Trump; his then-campaign manager, Corey Lewandowski; and the organization that served as his principal campaign committee. Jacobus described herself as "political strategist, public relations advisor, and news media commentator."Verified Complaint, *Jacobus v. Trump*, Index No. 153252/2016 (April 18, 2016), NYSCEF Doc. No. 1. She alleged that, over the previous year, she had met with representatives of the Trump campaign about possibly becoming the campaign's communications director. She claimed

these discussions ended badly, with Lewandowski becoming "agitated, loud, and rude."2017 WL 160316, at *1.

Jacobus never joined the Trump campaign. But she did provide running commentary about it, frequently appearing on television and posting on social media platforms, notably Twitter. See generally https://twitter.com/cherijacobus. Her commentary was sometimes positive, other times negative.

During a TV appearance in January 2016, Jacobus sharply criticized Trump's debate skills ("a third grader faking his way through an oral report") and accused him of purposely avoiding a Republican primary debate. The next day, Lewandowski retorted on a popular morning show, stating "This is the same person … who came to the office on multiple occasions trying to get a job from the Trump campaign, and when she wasn't hired clearly she went off and was upset by that."

One week later, Jacobus appeared on TV again, this time saying that "the [Trump] campaign lied about" the existence of a Trump Super PAC before shutting it down. She also added that Republican billionaire donors who were contacted by the campaign all refused to donate to Trump's effort.

This time, the response came directly from @realDonaldTrump—the candidate's personal Twitter account. Trump tweeted, "Great job on @donlemon tonight @kayleighmcenany @cherijacobus begged us for a job. We said no and she went hostile. A real dummy! @CNN."Jacobus's lawyer responded with a cease and desist letter, which apparently triggered another tweet in response. "Really dumb @CheriJacobus. Begged my people for a job. Turned her down twice and she went hostile. Major loser, zero credibility!"Unsurprisingly (given the medium) some of Trump's followers responded to these tweets by attacking Jacobus (on Twitter) with "demeaning, sometimes sexually charged comments, and graphics, including insults aimed at her professional conduct, experience, qualifications, and her purported rejection by Trump."2017 WL 160316, at *2.

Jacobus's complaint claimed that Trump and Lewandowski's comments were defamatory, harmed her professional reputation, and caused her to lose professional opportunities. She sought at least $2 million in damages for reputational and emotional harm. Defendants moved to dismiss the complaint.

The Opinion

The court's defamation analysis turned on two related issues: (1) whether Trump and Lewandowski's statements were too loose, figurative or hyperbolic to be actionable as defamatory, and (2) whether their statements were factual, meaning they can be proved true or false and thus were actionable, or whether they were opinions, which cannot be proved one way or the other and thus were privileged. As the court noted, "context is key" to both inquiries.

The court appears to have found three contextual factors salient here. First, the statements were made during a heated and contentious campaign—a public debate that was rife with epithets, fiery rhetoric and hyperbole, none of which is actionable. Second, Trump's statements were published online via social media, making them more likely to be read as opinion rather than fact—a judgment about the way people think about communications in the online context generally.See, e.g., Stephen M. Kramarsky, "Court Examines the Fact-Opinion Analysis in Defamation Case," N.Y.L.J. (Jan. 19, 2016).

The third factor was Trump himself. The court observed that Trump's reactionary tweets had a "defensive tone" that "signals to readers that plaintiff and Trump were engaged in a petty quarrel."2017 WL 160316, at *9. The court also considered the broader context: "Trump's regular use of Twitter to circulate his positions and skewer his opponents and others who criticize him, including journalists and media organizations whose coverage he finds objectionable."Id. at *10 (citation

omitted). The court found that Trump's short, 140-word tweets were "rife with vague and simplistic insults … all deflecting serious consideration."Id. at *10 (citations omitted).

Considering these circumstances, the court held that a "reasonable reader" would view the statements as "imprecise and hyperbolic political dispute cum schoolyard squabble"—and therefore understand them to be opinion, "even if some of the statements, viewed in isolation, could be found to convey facts." Id. at *11.

Crude Speech as a Matter of Law

There is some danger to this reasoning, and the court acknowledged it. The fact-opinion determination depends both on a statement's substance (what was said and what it means) and its context (where, why, and how it was said, and by whom). If the law says that certain features make it more likely that a statement is a privileged opinion rather than an actionable fact, that in effect turns those features into indicia of a statement's legality.

This matters. It effectively creates a safe harbor and provides incentives for people to adopt those protective features. If people can tweak the form of their statements to decrease their risk of liability, you can bet that they will—especially if the adjustments do not lessen the impact on their audience. Now consider the factors that were salient in this case: fiery rhetoric, informal tweets, immature attacks. These things shielded Trump from liability. (Despite ruling in Trump's favor, the court voiced its concern "that some may avoid liability by conveying positions in small Twitter parcels, as opposed to by doing so in a more formal and presumably actionable manner … ." Id. at *10.) In some sense, the law is *protecting* these traits, though many people would consider them undesirable in reasonable discourse.

Of course, the full story is more complicated. The privilege that protects opinions is rooted in First Amendment principles, which favor more rather than less speech and reflect an acute awareness of the problems that arise when the government is asked to draw lines between legitimate and illegitimate expression. Opinions, and the right to express them freely, are at the core of our democracy, and the law in this country has developed to protect them.

Courts have the difficult task of balancing these rules, principles and values. This can be especially challenging in cases where long-standing common-law doctrines must be applied in new contexts. For instance, in cases such as this one, courts must determine how the hypothetical "reasonable person" understands tweets, which in turn requires an understanding of the kinds of people who use Twitter, and how they interpret what they find there. This is a complex, evolving, and highly variable analysis —one that is challenging for even the most tech-savvy jurists.

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