"INTO THE BOWELS OF HELL": EXAMINING ONLINE DEFAMATION LAW THROUGH THE TWITTER ACCOUNT OF JAMES WOODS[+]

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I. INTRODUCTION

In today's world of Twitter and social media, it only takes a few seconds to ruin a reputation. The moment a tweet is posted on Twitter, it is delivered to the phones and computers of the poster's followers and, if particularly provocative or the poster has a large following, it may only take a few moments for the message to reach thousands or even millions of people. And, if the tweet is defamatory, the initial poster can be held legally liable to the injured person.

Twitter and other social media platforms present unique problems for defamation law and the justice system. While the volume and speed of messages has exponentially increased with the evolution of social media, the U.S. legal system remains slow, expensive, and cumbersome. Twitter posts are both ephemeral, in that they are fleeting messages replaced by a continuing stream of subsequent posts, and permanent, in that they are digitally preserved and easily found through a simple internet search. Many treat the medium as an opportunity to play fast and loose, to joke and prod, and to make provocative, off-the-cuff declarations. Others treat Twitter akin to a personalized form journalism, sharing their daily observations and following more traditional news sources. Tweets can be intimate notes shared within small groups or strategically manufactured messages to be disseminated to millions. Users turn to Twitter for their fact and fiction; it is where they catch-up on news and spread gossip.

Film actor James Woods is a conservative Twitter personality who uses the platform to provoke and attack celebrities, politicians, commentators, and news media that express liberal and progressive viewpoints – behavior

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commonly known on the internet as "trolling."[1] He also has his own trolls. Two lawsuits that stem from incidents on Twitter involving Woods offer an opportunity to explore the ways in which the medium and the law of defamation affect and are affected by one another.

Following a long-standing exchange of insults between Woods and an anonymous poster who used Twitter under the pseudonym "Abe List," Woods sued his troll in California state court for $10 million in defamation damages after Abe List called him a "sniffling and spouting" "cocaine addict."[2] The dispute ultimately settled after Abe List died and the court refused to dismiss the lawsuit at an early stage.

In the second lawsuit, Woods found himself on the receiving end of a defamation lawsuit arising from a tweet he posted during the 2016 presidential election campaign. Woods' tweet juxtaposed a photo of a woman at a Trump campaign rally wearing a Trump t-shirt and raising her arm in a Nazi salute. The tweet also included a biography and photo of a second woman named Patricia Boulger, who resembled the person in the Nazi salute, and stated, "So called #Trump 'Nazi' is a #BernieSanders agitator/operative?"[3] Woods' tweet was re-tweeted by others, including Donald Trump, Jr. Although there is a physical resemblance between the two, the woman in the Nazi salute was not Portia Boulger. After receiving hundreds of obscene and threatening messages, including death threats, Boulger sued Woods in federal court for defamation and privacy violations. She sought $3 million in damages.[4] This lawsuit was dismissed at the motion to dismiss stage.

This Article analyzes these two lawsuits in an effort to explore the legal nuances and practical realities of asserting a defamation claim arising in a social media context. Section II discusses the factual bases of the lawsuits, their procedural histories, and their resolutions. Section III explores the merits of the defamation claims in both lawsuits by analyzing the elements of a defamation claim as they apply to the facts of each case. Section IV addresses the unique problems that social media defamation litigants face with respect to anonymity, the public figure doctrine, and the actual malice

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[1] MERRIAM -WEBSTER ONLINE DICTIONARY (2018), https://www.merriam-webster.com/dictionary/troll.

[2] Complaint, James Woods v. John Doe, et al., No. BC589746 (Cal. Super. Ct. County of Los Angeles, Oct. 26, 2015).

[3] Matt Novak, *James Woods Sued for Misidentifying Trump Supporter Giving Nazi Salute on Twitter*, GIZMODO (Mar. 16, 2017, 10:10 AM), https://gizmodo.com/james-woods-sued-for-misidentifying-trump-supporter-giv-1793327162.

[4] Ashley Cullins *James Woods Sued for $3 Million by Woman Falsely Identified as Nazi Trump Supporter*, HOLLYWOOD REP. (Mar. 15, 2017, 4:24 PM), https://www.hollywoodreporter.com/thr-esq/james-woods-sued-3-million-by-woman-falsely-identified-as-nazi-trump-supporter-986580?utm_source=twitter.

standard. Section V concludes by offering recommendations relating to the law and litigation process, and remedies for social media defamation claims.

II. THE WOODS' LAWSUITS – BACKGROUND AND FACTS

James Woods, born in 1947, found fame in Hollywood as a film, television, and voice actor. Starting in the 1970s, James Woods' acting career was marked by playing seedy character roles, some of whom had cocaine and other drug addictions.[5] He has appeared in over 130 films. He was also the lead actor in the television series *Shark*, in which he played an unconventional prosecuting attorney, and worked as a voice actor for the Disney cartoon movie *Hercules* and the syndicated cartoon *Family Guy*.[6]

With the advent of Twitter, Woods found new fame and notoriety as a conservative commentator and online provocateur. He has become widely-known for tweeting conservative-leaning political commentary under the Twitter handle @RealJamesWoods. His rhetoric was favored by the Tea Party and later by right-wing enthusiasts and conservatives.[7] His tweets are edgy, insulting, and occasionally humorous. For example, after President Obama stated in a speech on racism that he personally felt he was a victim of racial profiling – explaining that he sometimes heard the sound of locks clicking on car doors as he walked by – Woods tweeted that "[t]he only reason people lock their car doors when Obama walks by is they are afraid he'll tax them to death…"[8] He called U.S. Congresswomen "clowns dressed as saloon hookers;"[9] described a GIF of a gay national news anchor as having his "butt plug dislodge[d] during a newscast;"[10] and chided a family tweeting a photo of their "gender creative" child at a Pride parade, stating, "[w]ait

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[5] Woods played drug addicts (and specifically cocaine addicts) in some of his major acting roles. One preeminent movie reviewer characterized one of Woods' performances as "one of the most convincing and horrifying portraits of drug addiction I've ever seen." Rodger Ebert, *The Boost*, ROGEREBERT.COM (Dec. 23, 1988), http://www.rogerebert.com/reviews/the-boost-1988.

[6] James Woods, IMDb, https://www.imdb.com/name/nm0000249/ (Jan. 1, 2019).

[7] Mark Judge, *James Woods: Buy More Guns and Learn How to Use Them!*, CNS NEWS (Dec. 30, 2015, 9:45 AM), https://www.cnsnews.com/blog/mark-judge/james-woods-buy-more-guns-and-learn-how-use-them.

[8] James Woods (@RealJamesWoods), TWITTER (July 19, 2013, 9:57 PM), https://twitter.com/RealJamesWoods/status/358450627153629184.

[9] James Woods (@RealJamesWoods), TWITTER (Oct. 20, 2017, 6:22 AM), https://twitter.com/realjameswoods/status/921365925521252352?lang=en.

[10] James Woods (@RealJamesWoods), TWITTER (May 11, 2017, 6:20 PM), https://twitter.com/realjameswoods/status/862839924705198080?lang=en.

until this poor kid grows up, realizes what you've done, and stuffs both of you dismembered into a freezer in the garage."[11]

Woods relished his provocative, bullying style and often declared that he was providing an important public service. At times, he opined that his tweeting might hinder his ability to find work in Hollywood. For instance, after he excoriated President Obama and his policies, one of his followers asked "dude, aren't u worried about... ever working again?? [sic]," [12] Woods responded, "I don't expect to work again. I think Barack Obama is a threat to the integrity and future of the Republic. My country first."[13]

A. *Twitter Trolls – James Woods v. Abe List*

1. Background Facts

"Abe List," who described himself as a "[m]ath dork in finance, partner in pvt eq [sic]," tweeted under the psudeonym @abelisted.[14] His Twitter profile stated: "This is my opinionated Id. Tweets some irony but not only. . . . Freedom in not needing to be liked."[15] Abe List had a few thousand Twitter followers and tweeted mostly personal political opinions from a liberal point of view. His tweets often called out, ridiculed, and poked fun at conservative commentators. He prided himself on his blunt rhetoric, harsh criticism, and willingness to take on right-wing figures.[16]

In December of 2014, Abe List started trolling Woods by ridiculing his tweets and calling him names such as "ridiculous," "prick," "scum," and "clown boy."[17] He continued to troll Woods for the next year and a half.

Then, on July 15, 2016, Woods tweeted, "USATODAY app features Bruce Jenner's latest dress selection, but makes zero mention of Planned

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[11] James Woods (@RealJamesWoods), TWITTER (July 9, 2017), https://twitter.com/RealJamesWoods/status/884297236338819072.
[12] M (@mm77atl), TWITTER (Oct. 8, 2013, 7:01 PM), https://twitter.com/mm77atl/status/387759674516594688.
[13] James Woods (@RealJamesWoods), TWITTER (Oct. 8, 2013, 7:39 PM), https://twitter.com/RealJamesWoods/status/387769349530222592.
[14] Although Abe List posted pseudonymously, this article uses a male pronoun because Abe List's attorney refers to him using the male pronoun. Press Release, *Man James Woods Sued for $10 Million Over One Tweet Will Appeal Court Ruling Keeping the Case Alive*, THE BLOOM FIRM (Feb. 2, 2016).
[15] Paul Farrell, *Abe List & the James Woods Lawsuit: 5 Fast Facts You Need to Know,* HEAVY.COM (Jan. 27, 2016, 1:26 PM), http://heavy.com/news/2015/07/abe-list-james-woods-twitter-lawsuit-defamation-troll/.
[16] Defendant John Doe's Notice of Motion and Special Motion to Strike, James Woods v. John Doe, et al., No. BC589746 (Cal. Super. Ct., County of Los Angeles, Jul. 29, 2015).
[17] Complaint, James Woods v. John Doe, et al., No. BC589746 (Cal. Super. Ct., County of Los Angeles, Jul. 29, 2015).

Parenthood baby parts market."[18] The strange juxtaposition of two unrelated news items was in keeping with Woods' Twitter persona. He simultaneously disrespected Caitlyn Jenner's identity as a transsexual woman by referring to her by her former masculine name while spreading anti-abortion conspiracy theories.[19] In response, Abe List tweeted, "cocaine addict James Woods still sniffing and spouting."[20]

Whether the phrase "cocaine addict" could be reasonably interpreted as a provable fact was ultimately determinative in the litigation.

Abe List's reference to cocaine addiction made use of the internet meme that someone is "high" or "smoking crack" to challenge the person's position

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[18] James Woods (@RealJamesWoods), TWITTER (July 15, 2015, 6:29 PM), https://twitter.com/RealJamesWoods/status/621310658601189376, reprinted in, *If An Actor Sues Someone From Twitter For Calling Him A Cocaine Addict Then He Is Probably A Cocaine Addict*, UNSPORTSMANLIKE CONDUCT (Feb. 12, 2016), http://www.unsportsmanlike-conduct.com/blog/if-an-actor-sues-someone-from-twitter-for-calling-him-a-cocaine-addict-then-he-is-probably-a-cocaine-addict.

[19] Caitlyn Jenner was born William Jenner who won the gold medal in the decathlon in the 1976 Summer Olympics. She came out as a trans woman in 2015 and starred in the reality television series following her gender transition entitled, "*I am Cait*." She has been called the "world's most famous transgender woman." Ramin Setoodeh, *How Caitlyn Jenner is Secretly Fighting Trump's White House on Transgender Rights*. VARIETY (Aug. 7, 2018), https://variety.com/2018/politics/features/caitlyn-jenner-trans-rights-advocate-1202896320/.

[20] *Infra* note 18.

as crazy or uninformed.[21] Woods was no stranger to the meme. Indeed, he tweeted that an Obama supporter should "put down your crack pipe" in one of his jabs.[22] Nevertheless, Woods latched on to the phrase "cocaine addict" from one tweet from one of his typical exchanges to initiate a defamation lawsuit against Abe List in California Superior Court in Los Angeles County seeking $10 million in damages.

Woods alleged that the "cocaine addict" statement was baseless, untrue, and defamatory and alleged that Abe List's "reckless and malicious behavior, through the worldwide reach of the internet, [had] now jeopardized Woods' good name and reputation on an international scale."[23] In an attempt to demonstrate how widespread the harm to his reputation was, Woods unironically pointed out that the tweet was published to the few thousand Abe List's Twitter followers – and the hundreds of thousands of James Woods' Twitter followers – and was easily accessible to anyone who performed a basic internet search.[24]

2. Litigation Process and Resolution

Early in the lawsuit, the parties brought competing motions. Because Woods did not know the identity of Abe List, his lawsuit was initially framed as a "John Doe" lawsuit. Woods first step was to move the court to force the disclosure of the identity of Abe List to allow discovery to proceed so he could ascertain Abe List's motives.[25] The court initially denied Woods' motion, holding that there was no need to allow discovery on the question of Abe List's mindset.[26]

Abe List also moved the court to dismiss the defamation claim under California's "Strategic Lawsuit Against Public Participation" statute, commonly known as a "SLAPP" motion.[27] A SLAPP motion is an early-stage motion designed to dismiss lawsuits intended to censor, intimidate, and silence critics by burdening them with legal fees to defend a defamation

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[21] "Smoking Crack." Urban Dictionary. 2018. http://www.urbandictionary.com/define.php?term=smoking%20crack (Apr. 13, 2017).
[22] James Woods (@RealJamesWoods), TWITTER (Oct. 11, 2013, 2:11 PM), https://twitter.com/RealJamesWoods/status/388773780417302528.
[23] Complaint, Woods v. Doe, No. BC589746 (Cal. Super. Ct., County of Los Angeles, Jul. 29, 2015).
[24] *Id*.
[25] Order, James Woods v. John Doe, et al., No. BC589746, 1 (Cal. Super. Ct., County of Los Angeles, Oct. 26, 015).
[26] *Id.* at 7.
[27] Unsigned Order, James Woods v. John Doe, et al., No. BC589746, 1 (Cal. Super. Ct., County of Los Angeles, Feb. 2, 2016).

action until they, or similar critics, abandon their criticism.[28] These lawsuits are often brought by plaintiffs who use their disparity of wealth or other privilege to silence critics with fewer resources even though the defendants' criticism was protected speech. Recognizing the need to protect free speech and public participation, the California legislature provided that SLAPP protections are to "be construed broadly."[29]

Abe List's SLAPP motion was premised on the argument that "his tweet is a figurative insult, not a statement of fact."[30] Woods offered expert testimony from a former University of Southern California linguistics professor to support his position that the term "cocaine addict" was factual in nature.[31]

After reviewing the paper filings but before oral arguments, the court issued what it later characterized as a "tentative" unsigned nine-page order ruling in favor of Abe List, striking Woods' lawsuit, and ordering Woods to pay Abe List's attorney fees.[32] The Court held that the "cocaine addict" tweet was a statement made in a public forum, involved a matter of public interest, and was in furtherance of Abe List's constitutional rights.[33] It also held that the testimony from the expert was inadmissible and concluded that the tweet was not actionable because, when considered in context, it would not reasonably be considered a statement of fact.[34] The court reasoned:

> The court finds that as a matter of law, in consideration of the totality of the circumstances, the tweet at issue is not a statement of fact but rather "rhetorical hyperbole, vigorous epithets, lusty[,] and imaginative expressions of contempt and language used in a loose, figurative sense" that does not support a defamation action. The tweet cannot be reasonably interpreted as stating actual facts about James Woods. Both tweets were in the context of expressing

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[28] The Strategic Lawsuits Against Public Participation statute authorizes a defendant to file an early special motion to strike a complaint against the plaintiff if the lawsuit is used as an "act in furtherance of [the defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue." Cal. Civ. Proc. Code § 425.16. A SLAPP motion cannot be brought against any defamation lawsuit, the complaint must involve, "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(3). If a party prevails on a SLAPP motion, the lawsuit will be dismissed, and the moving party will be awarded its attorneys' fees and court costs. *See* Cal. Civ. Proc. Code § 425.16(c).

[29] Cal. Civ. Proc. Code § 425.16.

[30] Unsigned Order, James Woods v. John Doe, et al., No. BC589746, 9 (Cal. Super. Ct., County of Los Angeles, Feb. 2, 2016).

[31] *Id.* at 9.

[32] *Id.*

[33] *Id.* at 4.

[34] *Id.* at 7-8.

> inflammatory opinions. There were not indicia of reliability as to defendant's tweet.
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> Plaintiff has not met his burden of showing a probability of prevailing.
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> The motion [to strike the complaint] is GRANTED. Defendant is entitled to his attorney's fees.[35]

The court appeared to completely agree with Abe List when it held that, given the context and totality of the circumstances, the tweet could not be interpreted as stating actual facts about Woods.

Then, after oral arguments on the matter, the Court remarkably reversed its position completely. In a second, half-page order issued six days later, the Court reversed its position to conclude that Woods had actually "met his burden of showing a probability of prevailing."[36] Although the revised order is silent about the court's prior holdings on the exclusion of expert testimony or the context of the tweet, the court fully-adopted the expert testimony and held that many if not all people who read the tweet actually understood it as a factual, defamatory statement about Woods.[37]

Following the order, Abe List's attorney publicly exclaimed that Abe List's Tweet was – much like Woods' own tweets excoriating Twitter users to "put down your crack pipe" – engaging in a "forum where wisecracks are the norm."[38] Twitter, the lawyer continued, "exists not only for the rich and powerful to lambast others, but for all users to express themselves, often colorfully, without fear of being dragged into expensive, stressful litigation. It is frightening to be sued for $10 Million by Mr. Woods, but Mr. Doe is fighting back."[39] Alas, Abe List's fight would not last long.

On the heels of SLAPP order, the court allowed Woods to move forward with discovery and ordered Abe List's attorneys to publicly identity their client.[40] Then, the attorneys for Abe List announced that Abe List had

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[35] *Id.* at 9-10, citing Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th 798, 789 (Cal. Ct. App. 2002).

[36] Order, James Woods v. John Doe, et al., No. BC589746 (Cal. Super. Ct., County of Los Angeles, Feb. 8, 2016).

[37] *Id.*

[38] Press Release, The Bloom Firm, Man James Woods Sued for $10 Million Over One Tweet Will Appeal Court Ruling Keeping The Case Alive (Feb. 9, 2016), https://www.thebloomfirm.com/wp-content/uploads/2019/03/jameswoods.pdf.

[39] *Id.*

[40] Eli Rosenberg, *James Woods Clears Hurdle in Effort to Unmask Twitter User*, N.Y. TIMES (Feb. 1, 2016), https://www.nytimes.com/2016/02/12/technology/james-woods-seeks-to-unmask-twitter-user-in-defamation-case.html.

died during the litigation. Following a Tweet from Abe List's attorney stating that he died, Woods retorted: [41]

Instead of moving forward with the litigation, the estate of Abe List settled the lawsuit and Woods dismissed his claim. Although the terms of the settlement are not public, Abe List's attorney subsequently made a statement – likely required by the settlement – that he "did not intend for his July 15, 2015 tweet about Mr. Woods to be understood as a statement of fact," and Abe List "regretted having made the tweet, and further regrets any harm caused to Mr. Woods' reputation by the tweet."[42]

B. *Nazi Salute – Boulger v. Woods*

1. Background Facts

Woods found himself as the defendant in a second defamation lawsuit when, during the 2016 presidential campaign, he tweeted two photographs. One photograph, initially published in the Chicago *Tribune*, shows a woman wearing a Trump t-shirt making a Nazi-like salute. The second part of the

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[41] Eriq Gardener, *James Woods Cheers Dropped Appeal from Dead Defendant in $10M Defamation Suit*, HOLLYWOOD REP. (Oct. 21, 2016, 10:22 AM), http://www.hollywoodreporter.com/thr-esq/james-woods-cheers-dropped-appeal-940364.

[42] Eriq Gardner, *James Woods Drops Lawsuit Over "Cocaine Addict" Tweet After Getting Trophy Letter*, HOLLYWOOD REP. (July 19, 2017, 3:22 PM), https://www.hollywoodreporter.com/thr-esq/james-woods-drops-lawsuit-cocaine-addict-tweet-getting-trophy-letter-1022660.

tweet contains a photograph and biography of a woman named Portia Boulger, who was a grass-roots organizer and supporter of Bernie Sanders. Woods' tweet also stated, "So called #Trump "Nazi" is a #BernieSanders agitator/operative?"[43]

Donald Trump Jr. then re-tweeted Woods' tweet with the comment, "She runs Bernie Sander's women for Bernie site. It's all staged."[44] Woods had over 350,000 Twitter followers at the time of his post. Donald Trump, Jr. had over two million followers.

The woman in the photograph giving the Nazi-salute was not Portia Boulger. She was Brigitt Peterson, a Trump supporter living in Yorkville, Illinois, who made the salute during a heated exchange with anti-Trump

[43] Reprinted in Matt Novak *James Woods Sued for Misidentifying Trump Supporter Giving Nazi Salute on Twitter*, GIZMODO (Mar. 16, 2017, 10:10 AM), https://gizmodo.com/james-woods-sued-for-misidentifying-trump-supporter-giv-1793327162.
[44] Complaint, *Portia Boulger v. James Woods,* No. 2:17-cv-186, 3 (S.D. Ohio March 3, 2017).

protesters at a Trump rally that was ultimately canceled because of security concerns.[45]

Following Woods' tweet, Portia Boulger received hundreds of obscene and threatening messages, including death threats.[46] She notified Woods that his tweet was inaccurate and defamatory and demanded that he delete his post, which he did 11 days after the original post. Woods then tweeted, "I have an opportunity to clarify something that I challenged immediately when it hit Twitter. Portia A. Boulger was NOT the 'Nazi salute lady.'"[47]

Boulger then filed a federal lawsuit in the U.S. District Court for the Southern District of Ohio on March 3, 2017. Her complaint alleged that Woods defamed her and violated her privacy, and sought compensatory and punitive damages in excess of $3 million.[48]

2. Procedural History and Resolution

Woods brought a motion to dismiss the lawsuit under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.[49] The court granted the motion for failing to state a viable defamation and privacy claim and dismissed the lawsuit.

In its ruling, the court held that Woods' tweet could be reasonably interpreted in two ways. It could be interpreted as "an assertion of fact that Boulger and the woman giving the Nazi salute are the same person."[50] The inclusion of the question mark at the end of the tweet, however, opened the tweet to being possibly interpreted as a question or as inviting the reader to further investigation.[51] The court explained:

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[45] Rosemary Sobol & Gregory Pratt, *Trump Supporter Explains What Led to the 'Heil Hitler" Salute at Canceled Chicago Rally*, CHI. TRIB. (Mar. 12, 2016, 8:40 PM), http://www.chicagotribune.com/news/ct-birgitt-peterson-trump-rally-met-0313-20160312-story.html.

[46] *Id.*

[47] Order, Portia Boulger v. James Woods, No. 2:17-cv-186, 2 (S.D. Ohio Jan. 24, 2018).

[48] Complaint at 5, *Boulger,* No. 2:17-cv-186 (S.D. Ohio March 3, 2017).

[49] Order, *Boulger*, No. 2:17-cv-186 (S.D. Ohio Jan. 24, 2018). Woods also moved the court to dismiss the lawsuit for failing to properly serve the lawsuit on him pursuant to Federal Rule of Civil Procedure 12(b)(5). The court denied this motion. *Id.*at 14.

[50] *Id.* at 20. Other courts have found questions as defamatory statements of fact. *See, e.g., Chapin v. Knight-Ridder, Inc*., 993 F.2d 1087, 1094 (4th Cir. 1993) ("[a] question can conceivably be defamatory, though it must be reasonably read as an assertion of a false fact"); *Beverly Hills Foodland v. United Food & Comerc. Workers Union, Local 655,* 39 F.3d 191, 195 (8th Cir. 1994) ("While statements in the form of opinions or questions do not enjoy absolute protection as such, to be actionable such statements must be reasonably read as an assertion of a false fact.") (internal citations omitted).

[51] *Id.* at 18-19.

> Were it not for the question mark at the end of the text, this would be an easy case. Woods phrased his tweet in an uncommon syntactical structure for a question in English by making what would otherwise be a declarative statement and placing a question mark at the end. Delete the question mark, and the reader is left with an unambiguous statement of fact: "So-called #Trump 'Nazi' is [Portia Boulger,] a #BernieSanders agitator/operative."
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> But the question mark cannot be ignored. The vast majority of courts to consider questions as potential defamatory statements have found them not to be assertions of fact. Rather, a question indicates a defendant's "lack of definitive knowledge about the issue" and "invites the reader to consider" various possibilities.[52]

Applying the Ohio "innocent construction rule," the court held that, because the tweet was open to two different interpretations – one defamatory and one not – the non-offending interpretation would be adopted, and the tweet would be deemed non-defamatory as a matter of law.[53]

III. DEFAMATION LAW AND TWITTER

As with any defamation claim, the plaintiff asserting a defamation claim arising out of a tweet or social media post must show (1) the statement was published to a third party, (2) the audience understood the statement to be about the plaintiff, (3) the statement was factually false, (4) the plaintiff suffered an injury as a proximate result of the publication, and (5) the defendant acted with the requisite degree of fault in publishing the statement.[54] This section will analyze the offending tweets in the Woods' lawsuits with respect to the elements of a defamation claim.[55]

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[52] *Id.* quoting Partington v. Bugliosi, 56 F.3d 1147, 1157 (9th Cir. 1995).

[53] *Id.* It is important to note that California, where the Abe List lawsuit was filed, does not follow the innocent construction rule. In 1962, the California Supreme Court rejected such a rule because it "protects, not the innocent defamer whose words are libelous, but the clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language." *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 551 (Cal. 1959). As such, the location of the jurisdiction of the Nazi salute lawsuit may have been determinative in its outcome.

[54] RESTATEMENT (SECOND) OF TORTS § 588 cmt. a (AM. LAW INST. 1977).

[55] It is worth noting that this article is solely discussing defamation law in the United States of America. Defamation laws in other countries such as Great Britain and Canada are substantially less protective of free speech than the United States. Nicole Manzo, *If You Don't have Anything Nice to Say, Say it Anyway: Libel Tourism and the Speech Act*, 20 ROGER WILLIAMS U.L. REV. 152, 159-62 (2015); Michael Rustad & Thomas Koenig, *Harmonizing Cybertort Law for Europe and America*, 5 J. HIGH TECH. L. 13, 37 (2005).

A. *Publication*

As to the first element, a tweet is, by its very nature, published to a third party. "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed."[56] A cause of action accrues when a communication is published on the internet, web site, or social media post.[57] So long as a Twitter user has any follower other than the person who the tweet is about, the tweet will be considered to be published the moment the sender presses send. In this case, both disputed tweets were published to the followers of Abe List's and Woods' Twitter accounts.

B. *About the Plaintiffs*

A defamatory statement must also be made about another person, which was met in both lawsuits at issue.[58] Abe List's tweet was specifically about James Woods. It was posted in direct response to Woods' earlier tweet attacking Caitlyn Jenner, included Woods full name, and referred to his twitter handle "@RealJamesWoods."[59] Woods' Nazi tweet was about Portia Boulger. The tweet included her biography and photo. Donald Trump, Jr. then re-tweeted Woods' insinuation that Boulger was the person making the Nazi salute.[60]

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[56] RESTATEMENT (SECOND) OF TORTS § 577 (AM. LAW INST. 1977).

[57] Roberts v. McAfee*,* 660 F.3d 1156, 1166-67 (9th Cir. 2011) (citing cases finding that the initial publication of communication on-line constitutes the first publication starting the statute of limitations for defamation claim). "It is not necessary that the defamatory matter be communicated to a large or even a substantial group of persons. It is enough that it is communicated to a single individual other than the one defamed." RESTATEMENT (SECOND) OF TORTS § 577, cmt. b (AM. LAW INST. 1977).

[58] RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

[59] At the time of the disputed tweet, Twitter users would use the @ sign in front of an account name to respond to the initial tweet, thus posting the tweet to the poster's followers as well as the followers of the identified person. Jay Yarow, *How to Use the @ Symbol on Twitter,* BUSINESS INSIDER (Apr. 21, 2012, 4:43 AM), https://www.businessinsider.com.au/how-to-use-the-symbol-on-twitter-2012-4. Twitter has updated its interface when someone tweets the @ symbol in front of an account. Twitter has replaced the @username with the phrase, "In reply to _____." Sarah Perez, *Twitter Moves Away from 140 Characters, Ditches Confusing and Restrictive Rules,* TECH CRUNCH (May 24, 2016), https://techcrunch.com/2016/05/24/twitter-moves-away-from-140-characters-ditches-confusing-and-restrictive-rules/.

[60] Matt Novak *James Woods Sued for Misidentifying Trump Supporter Giving Nazi Salute on Twitter*, GIZMODO (Mar. 16, 2017, 10:10 AM), https://gizmodo.com/james-woods-sued-for-misidentifying-trump-supporter-giv-1793327162.

C. *Factually False / Truth Defense*

To constitute defamation, a communication must consist of a statement of fact that concerns the conduct or character of another person.[61] The core legal issue decided by the courts in Woods' lawsuits are whether the tweets are statements of fact or something else all-together. In the Abe List lawsuit, the legal question was whether the statement was factual or rather would be interpreted in context as an opinion, hyperbole, satire, sarcasm, or exaggeration. In the Boulger lawsuit, the legal issue was framed up as whether the tweet was asserting a factual statement about or posing a question.

1. Abe List – Opinion, Hyperbole, Satire and Exaggeration

a. Fact v. Opinion in Social Media

Long before the advent of Twitter or any other form of social media, U.S. courts drew a line between actionable false statements of fact and protected statements of opinion, hyperbole, satire, or exaggeration. In *Milkovich v. Lorain Journal Co.*, the Supreme Court explained that statement must (1) contain or imply a verifiable fact about the plaintiff and (2) be reasonably susceptible to being interpreted as an assertion of fact.[62] Context is critical when examining whether a communication can be reasonably interpreted as stating facts about the plaintiff. In addition to analyzing the language used in the statement, courts examine the context in which the statement was made, the medium the statement was transmitted, the historical interactions of the parties and, ultimately, the reasonable expectations of the intended audience.[63] Critical to this analysis is the assessment of the "knowledge and understanding of the audience targeted by the publication."[64]

Courts must initially "examine the nature and full content of the particular communication."[65] The language in the statement must be examined to determine whether it is "sufficiently factual to be susceptible of being proved true or false."[66] Once the statement is deemed to be sufficiently factual, courts turn to context.

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[61] RESTATEMENT (SECOND) OF TORTS § 565 (AM. LAW INST. 1977).
[62] Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
[63] Matthew E. Kelly & Steven D. Zansberg, *A Little Birdie Told Me, "You're a Crook": Libel in the Twittersphere and Beyond*, 30 COMM. L., 1, 25 (2014).
[64] Bently Reserve LP v. Papaliolios, 218 Cal. App. 4th 418, 160 Cal. Rptr. 3d 423, 429-30 (Ct. App. 2013).
[65] *Id.* at 429.
[66] Underwager v. Channel 9 Australia, 69 F.3d 361, 366 (9th Cir. 1995).

Historically, defamation analysis is recipient-centered because the standard is whether a "reasonable" recipient would, and did, interpret the statements as false and injurious. The recipients' interpretation depends on the message, the context in which it is made, and the recipients' values, background, and knowledge.[67] Courts employ various techniques to determine the meaning of a contested statement. "The most important of these techniques, aside from examining the words themselves, is analyzing the context in which the words were spoken."[68] A communication must also be evaluated "in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work."[69]

The medium strongly affects how an audience will interpret a statement. For example, if a character in a play accuses another character of committing a murder, no one would interpret the statement as a statement of fact about the other actor. It will be understood as a statement within the context of a theatrical production. An article on the front page of newspaper will be interpreted differently from a letter to the editor. A statement made during a news interview will be interpreted differently from the same statement in a "shock jock" radio show; the audience will more likely interpret the former as a statement of fact and the latter as a statement of opinion or exaggeration. A statement on a late-night talk show or Saturday Night Live will more likely be interpreted as a satire, exaggeration, or hyperbole than a statement on a news channel. Finally, a speaker with a personal knowledge of another will more likely be viewed as making a factual statement about that person than someone who has never met the person.[70]

Twitter and social media are transforming the nature of how people share gossip, consume media, and get their news.[71] As ever present as it now seems, Twitter only came into existence in 2006. When Twitter emerged onto the scene, its defining characteristic was that messages were limited to 140 characters or less.[72] Tweets are made instantaneously available to the poster's followers and can easily tag other Twitter users and insert hashtags

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[67] Marc Franklin & Daniel Bussel, *Defamation and the First Amendment: New Perspectives: The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WILLIAM & MARY L. REV. 828, 829-30 (1984).
[68] *Id*.
[69] Underwager v. Channel 9 Australia, 69 F.3d at 366.
[70] Matthew E. Kelly & Steven D. Zansberg, *A Little Birdie Told Me, "You're a Crook": Libel in the Twittersphere and Beyond*, 30 COMM. L. 1, 25 (2014).
[71] Enrique Monagas, *Prosecuting Threats in the Age of Social Media*, 36 N. Ill. U. L. Rev. 57, 61 (2016).
[72] Twitter Inc., *Annual Report 2013* at 3, https://s22.q4cdn.com/826641620/files/doc_financials/ar/Twitter-Inc-2013-Annual-Report.pdf.

that link a tweet to other tweets using the same hashtag[73] This form of communication is radically different from traditional news and publication sites that publish longer articles, operate on predictable publication cycles, and apply journalistic standards of review. Twitter is both fleeting and permanent. Although most tweets are quickly replaced by an ongoing feed of newer tweets, they are digitally stored on the web and instantly available to anyone conducting a simple search. Furthermore, if a tweet is picked up and re-tweeted by other users, it can spread through the Twittersphere and have a global reach in a matter of hours.[74]

It is also important to acknowledge the wide spectrum of Twitter users and feeds. On one hand, many Twitter users and feeds are credible, factually-oriented, and newsworthy. These feeds are used by established news organizations, public officials, and reporters. On the other hand, most Twitter users and feeds, especially those of celebrities, state their opinions in a self-promoting, informal, and off-the-cuff manner. As in this case, trolls across the medium write in a provocative and hyperbolic fashion with the intent create and add flames to a controversy.

The 140-character, now 280-character, limitation and short cycle of Twitter lends itself to more informal off-the-cuff statements that are necessarily vague, incomplete, ambiguous, and crammed full of shorthand. Because of Twitter's on-the-fly nature, it is fertile ground for people letting loose what might otherwise be considered defamatory statements. Although there are a limited number of published Twitter defamation lawsuits, courts have provided limited insight on whether a statement will be considered actionable or protected speech.

One California court of appeals court explained, "[w]hile courts have recognized that online posters often 'play fast and loose with the facts,' this should not mean that online commentators are immune from defamation liability."[75] Many courts are reluctant to assume that Twitter and social media users are serious and factually-oriented, especially when they post anonymously. One New York appellate court explained that the "freewheeling, anything goes writing style" prevalent on the Internet means that "readers give less credence to allegedly defamatory remarks published

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[73] Ellyn Angelotti, *Twibel Law: What Defamation and its Remedies Look Like in the Age of Twitter*. 13 J. HIGH TECH L. 430 (2012).

[74] Cory Batza, *Trending Now: The Role of Defamation Law in Remedying Harm from Social Media Backlash*, 44 PEPP. L. REV. 429, 432 (2017).

[75] Saunders v. Walsh, 219 Cal. App. 4th 855, 162 Cal. Rptr. 3d 188, 196 (Ct. App. 2013), quoting Summit Bank v. Rogers, 206 Cal. App. 4th 669, 696, 142 Cal. Rptr. 3d 40 (Ct. App. 2012).

on the Internet than to similar remarks made in other contexts."[76] The lack of seriousness is uniquely pronounced when the poster is anonymous or uses a pseudonym. "Indeed, the very fact that most of the posters remain anonymous, or pseudonymous, is a cue to discount their statements accordingly."[77]

b. Analyzing the Abe List Tweet as Fact or Opinion

James Woods won the first round of litigation when a trial court denied a preliminary motion to dismiss the lawsuit, finding that the lawsuit did violate California's Anti-SLAPP statute. After initially delaying discovery by Woods and stating that it would dismiss the lawsuit, the court changed course by ruling that Abe List's short tweet referring to Woods as a "cocaine addict" would be interpreted by some of the Twitter followers as a statement of fact. The court was swayed by the opinion of a former professor of linguistics from the University of Southern California who interpreted the linguistic structure of the tweet in isolation of context. The court explained:

> Applying the totality of circumstances test, and examining the plain language of the Tweet, it is clear that any reader of the [Abe List] False Statement could and indeed must view it as a statement of *fact.* As described by Professor Finegan, [Abe List]'s use of a prenominal characterization (*i.e.*, "cocaine addict") followed by a proper noun (*i.e.*, "James Woods") is a well-established linguistic structure widely used to characterize people with shorthand ***factual*** information. Professor Finegan's opinion that "many if not all readers of the 'cocaine addict' Tweet will understand and interpret Abe List to be making a factual claim about James woods – namely that he is a cocaine addict' is on an issue of fact. His opinion is sufficiently beyond common experience and assists the trier of fact.[78]

If the words "cocaine addict James Woods sniffing and spouting again" were evaluated in complete isolation of context and format, a finder of fact could very well conclude, as the court did, that the statement could possibly be understood as a technical statement of fact. If so, Abe List would have

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[76] Sandals Resorts Int'l Ltd. v. Google, Inc., 86 A.D.3d 32, 925 N.Y.S.2d 407 (App. Div. 2011), quoting Erik Cheverud, *Comment: Cohen v. Google, Inc*. 55 N.Y.L. Sch. L. Rev. 333, 335 (2010/11).

[77] Lyrisssa B. Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*. 49 DUKE L.J., 855, 937 (2000).

[78] Order, James Woods v. John Doe, et al., No. BC589746 (Cal. Super. Ct., County of Los Angeles, Feb. 8, 2016) (emphasis in original).

been in legal hot water. But the legal analysis cannot stop with the terms of the tweet itself. The court must also consider the context of the tweet and totality of the circumstances to consider how a reasonable audience interpreted the tweet.

When it reversed its ruling and ignored the context of the statement, it stacked the deck against Abe List by forcing him and his estate to litigate a non-viable claim in which there was no injury to a wealthy, vindictive plaintiff. Furthermore, although a SLAPP statute provides a mechanism for a prevailing defendant to recover its attorney fees, that same defendant cannot recover attorney fees if it prevails at summary judgment or trial. In other words, the court's denial of Abe List's SLAPP motion forced Abe List to incur significant litigation expenses to defend himself against a thin legal claim that resulted in little to no damages.

Had the court considered the offending tweet beyond the word-by-word semantic level and considered the specific and general context, as it did in its initial ruling, it should have granted the SLAPP motion and dismissed the lawsuit. The followers of James Woods and Abe List's twitter feeds know what an internet troll is and would not have attributed the tweet as being factual or accurate. Indeed, Woods and Abe List were trolls in their own right. That is, in part, why their audiences follow them.

The tweet was a jab in a long-standing back-and-forth between two trolls. The dislike and tone was mutual. Given this long-standing spat between two trolls, the twitter audience would not have reasonably interpreted Abe List's tweet as anything but an insult in an ongoing mud fight.[79] As with Woods' use of the "crack pipe" meme, his audience would know Abe List's "cocaine addict" tweet for what it was – a jab using the loose vernacular of the medium and not a statement that his sparring partner was actually an addict. In *Feld v. Conway*, where the defendant tweeted, "Gina Holt – you are fucking crazy," the court held that "[t]he tweet cannot be read in isolation, but in the context of the entire discussion. In this case, the tweet was made as part of a heated Internet debate. . . . [I]t cannot be read literally without regard to the way in which a reasonable person would interpret it."[80] The Abe List court should have reached the same conclusion.

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[79] *See* Old Dominion Branch No. 496 v. Austin*,* 418 U.S. 264, 284 (1970) quoting 264 Cafeteria Employees Local 302 v. Angelos*,* 320 U.S. 293, 295 (1943); Friedman v. Bloomberg L.P., 884 F.3d 83 (2d Cir. 2017) (dismissing complaint where the word "extort" was, when considered in context, hyperbole and non-actionable); Greenbelt Cooperative Pub. Ass'n v. Bresler*,* 398 U.S. 6 (1970) ("[E]ven the most careless reader must have perceived that the word [blackmail] was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.").

[80] Feld v. Conway, 16 F. Supp.3d 1, 4 (D. Mass. 2014).

2. Boulger – Statement or Question?

In the Boulger case, the court concluded that Woods' tweet could have been interpreted either as a statement of fact (Boulger *is* a Bernier Sanders agitator making Nazi pose.) or a question posed to the audience (*Is* Boulger a Bernie Sanders agitator in the Nazi salute?). The court explained that, but for the question mark at the end of the tweet, the reader is left with an unambiguous statement of fact: "So-called #Trump 'Nazi' is [Portia Boulger,] a #BernieSanders agitator/operative."[81] But, because the question mark was included, the court concluded that the tweet could be interpreted either way.[82]

The court dismissed Boulger's lawsuit because it could reasonably be interpreted by some members of the Twitter audience as a question and not a statement of fact. Ohio followed the "innocent construction rule," a rule that a communication with both a reasonably defamatory and reasonably non-defamatory interpretation would be deemed non-defamatory as a matter of law.[83] It is important to note that the innocent construction rule is controversial and only followed by a small minority of jurisdictions.[84]

D. *Harm to the Plaintiff's Reputation*

The final essential element of a defamation claim is that the communication injures another's reputation or cause special damages.[85] Although neither court ruled on the injury to the plaintiff's reputation in the two lawsuits at issue, if the communications were considered factual statements (and not opinion, hyperbole, satire, or questions), then the next question would be whether they were libel per se or whether they plaintiffs suffered actual damages.

In general, a statement is deemed to be libel per se if it alleges that the defendant committed a crime, contracted a loathsome disease, committed adultery, or engaged in unlawful business dealings.[86] In situations of libel per

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[81] Order, Portia Boulger v. James Woods, No. 2:17-cv-186, 18 (S.D. Ohio Jan. 24, 2018).
[82] *Id.*
[83] *Id*. at 20.
[84] Robert Richards, *When "Ripped from the Headlines" Means "See You in Court": Libel by Fiction and the Tort-Law Twist on a Controversial Defamation Concept*, 13 TEX. REV. ENT. & SPORTS L. 117, 135 (2012); *Beyond Words: The Potential Expansion of Defamation by Conduct in Massachusetts*, 83 B.U. L. Rev. 619, 629-30 (2003).
[85] RESTATEMENT (SECOND) OF TORTS § 569 (AM. LAW INST. 1977) (addressing liability *per se* without proof of pecuniary damages); RESTATEMENT (SECOND) OF TORTS § 575 (AM. LAW INST. 1977) (addressing liability with proof of pecuniary damages).
[86] RESTATEMENT (SECOND) OF TORTS § 569, coms. b, e, and f. (AM. LAW INST. 1977).

se, plaintiffs may not be required to prove that they suffered financial damages prior to recovering for general injuries to their general reputation.[87]

1. Abe List

Woods may not have been required to prove that he suffered any actual financial injuries because the statement that he is a "cocaine addict" is arguably defamatory per se. However, it would be difficult for Woods to claim that he suffered any emotional injury or damage to his reputation when he actively picks fights and attacks with celebrities, politicians, and private citizens on a weekly, if not daily, basis. Because Woods' Twitter persona is centered around insults and mud-slinging, he is in no position to claim injury for others doing the same thing. If he cannot handle being chided for snorting cocaine and spouting his opinions, he should not be chiding others to put down their crack pipes.

2. Boulger

Whether Woods' tweet about Boulger was defamation per se may depend on how the tweet was interpreted. If the tweet meant that Boulger was a Nazi, the tweet could arguably be considered libel per se as an imputation on her morality and possibly her business, trade or profession, all of which constitute libel per se.[88] If the tweet was interpreted as falsely calling Boulger a Bernie Sanders' operative and agitator, this could arguably impugn her business, trade or profession.[89] The injury to Boulger received threats, including death threats, as a result of being the false target of Woods' tweet. These are cognizable injuries.

IV. KEY LEGAL AND PRACTICAL ISSUES IN SOCIAL MEDIA DEFAMATION CLAIMS

A. *The Problem of Anonymity*

As in every legal cause of action, the aggrieved party asserting a social media defamation claim must identify and ultimately serve the complaint on the alleged wrongdoer in order for the court to have jurisdiction over the defendant. Much of the communication on Twitter and other social media are made anonymously under a pseudonym, as was the case with Abe List.

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[87] *Id.*
[88] *Id.* at cmt. e and f.
[89] *Id.* at cmt. e.

Anonymous online speech poses a unique challenge during the initial stages of a lawsuit because the plaintiff initially needs to identify the proper party to sue. When the identity of a poster is unknown, the allegedly defamed plaintiff must initiate a "Doe" lawsuit without a named defendant and then serve a subpoena on the anonymous poster's Internet Service Provider to disclose the user's identity.[90] Even then, the Internet Service Provider generally needs to notify the user that he or she is being sued and the user is allowed to file a motion to quash the subpoena. Internet Service Providers are only able to provide the internet protocol address that identifies the computer used to make a particular social media post.

Anonymous communications have long held an important place in our nation's political and social discourse, and the Supreme Court has repeatedly held that the right to speak anonymously is protected by the First Amendment. In *McIntyre v. Ohio Elections Comm'n*, the Court explained:

> Anonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society.[91]

These principles of anonymity and free speech are applicable to social media and communications. When describing the internet, the Supreme Court explained that "websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[92]

Although anonymity may give the illusion that a poster is free to troll with little consequence, the law allows defamed persons to sue anonymous posters and to discover the poster's identity if the injured party makes a strong initial case for defamation. When determining whether to unmask the identity of an anonymous social media speaker, courts have employed a variety of tests to balance the First Amendment right of the speaker to remain anonymous with the alleged injured party's rights from seeking legal relief. Although there is no single test for unmasking an anonymous social media poster, would-be plaintiffs must generally make some factual showing that

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[90] Lindsey Cherner, *None of Your Business: Protecting the Right to Write Anonymous Business Reviews Online,* 40 COLUM. J. L. & ARTS 471, 479 (2017).

[91] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) citing J. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 3-4 (R. McCallum ed. 1947) (1859).

[92] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017); *see also* Reno v. ACLU*,* 521 U.S. 844, 870 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer").

their defamation claim has merit, adequate notice to the defendants, and evidence that the poster's identity is needed to advance the claim. Some of the tests include a (1) good faith showing, (2) balancing test,[93] and (3) summary judgment test.[94]

In the Abe List lawsuit, the court initially denied Woods' request seeking the identity of Abe List, only to change its position when ruling on the SLAPP motion. It was only after the court allowed Woods to discover Abe List's identity that the parties reached a resolution. Notably, it was about this time that the attorney for Abe List disclosed that her client had died. One can surmise that, with the prospect of facing protracted litigation against a deep-pocketed plaintiff and provocateur, that Abe List's estate decided to resolve the lawsuit and maintain his anonymity.

B. *The Problem of Public Figures*

The Woods lawsuits also illustrate the fact that different standards of fault are applied in defamation cases depending on whether the plaintiff is a public figure or a private figure, and whether the communications involve a public controversy. A private figure needs only to prove that the defendant acted negligently when making a defamatory statement, which means that a reasonable person would not have published the statement.[95] Recognizing the importance of unfettered debate and the protection of free speech under the First Amendment, U.S. courts hold public figures and public officials to a higher standard when asserting claims of defamation. Public figure plaintiffs have the heightened burden of showing that the defendant acted with "actual malice" when making the defamatory statement.[96] Plaintiffs suing media defendants must also prove actual malice.[97]

Actual malice is defined by the Supreme Court as having knowledge that the statement was false or made with reckless disregard of whether it was false or not.[98] The actual malice standard also applies to private figures

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[93] *See* Lindsey Cherner, *None of Your Business: Protecting the Right to Write Anonymous Business Reviews Online,* 40 COLUM. J. L. & ARTS 471, 479-86 (2017); Jesse Lively*, Can a One Star Review Get Sued? The Right to Anonymous Speech on the Internet and the Future of Internet Unmasking Statutes*, 48 J. MARSHALL L. REV. 693, 700 (2015); Amy Pomerantz Nickerson, *Coercive Discovery and the First Amendment: Towards a Heightened Discoverability Standard,* 57 UCLA L. REV. 841, 864–67 (2010) (courts apply different standards).

[94] Cherner, 40 COLUM. J. L. & ARTS at 479-86.

[95] Gertz v. Robert Welch, Inc., 418 U.S. 323, 353 (1974).

[96] Curtis Publ'g Co. v. Butts, 388 U.S. 130, 160 (1967).

[97] N. Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

[98] *Id*. at 280.

who publicly speak out and inject themselves into controversies of public concern.[99]

Some people are, by their very positions, general public figures, meaning that they will be held to the heightened actual malice standard. General public figures include, for instance, politicians and celebrities who have achieved such "pervasive fame or notoriety" or who occupy positions of "pervasive power and influence" that they will be considered public figures.[100] There are several factors considered to determine whether someone is a general public figure, including whether (1) they have broad access to media, (2) they assumed the risk by injecting themselves into the public eye, (3) they are famous or notorious, (4) they have the ability to influence the media, (5) they pursued media attention, and (6) there are public issues at issue in the lawsuit.[101]

Others are considered limited public figures for a specific issue if they are minor celebrities or private citizens who voluntarily inject themselves into or participate in a public controversy and have access to the media to disseminate their position.[102] For example, a private citizen who becomes an outspoken advocate or a community leader for a particular political or social controversy may be considered a limited public figure on that particular controversy.[103] The primary rationale for requiring limited public figures to meet a higher standard in defamation claims is that they have the opportunity and means to respond to false statements through the media on particular topics that are otherwise unavailable to most private persons.[104]

It is difficult for public figures to meet the actual malice standard. In what was reportedly the first U.S. trial alleging defamation over a tweet, an attorney sued musician Courtney Love for her admittedly false tweets about him.[105] The attorney was deemed to be a limited public figure by the court and, despite the fact that the jury found Love's tweets to be false and injurious to his reputation, Love was not held liable because the plaintiff attorney did not prove that Love knew her statement was false or doubted the

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[99] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47-48 (1971).
[100] *Geertz*, 418 U.S. at 351.
[101] Roderick D. Eves, *The Classification of Athletes and Entertainers as Plaintiffs in Defamation Lawsuits,* 4 U. MIAMI ENT. SPORTS L. REV. 333, 337-42 (1987).
[102] *Gertz*, 418 U.S. at 351; Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).
[103] *Id.*
[104] Cory Batza, *Trending Now: The Role of Defamation Law in Remedying Harm from Social Media Backlash*, 44 PEPP. L. REV. 429 (2017).
[105] Eriq Gardner, *Courtney Love Wins Twitter Defamation Trial.* HOLLYWOOD REP (Jan. 24, 2014, 5:03 PM), http://www.hollywoodreporter.com/thr-esq/courtney-love-wins-twitter-defamation-673972.

truth of it.[106] In other words, Love was not found to have acted with actual malice.

When applied to the Abe List lawsuit, Woods would likely have been considered a general or a limited public figure. Woods lived an extraordinarily public life. He was a famous movie star who used Twitter to weigh in on the public narrative by provocatively and aggressively criticizing the Obama administration and other centrist or non-right leaning groups and positions. He had access to mainstream and digital media and, due to his substantial Twitter following, had a much wider immediate audience on Twitter to respond. Furthermore, because Abe List was responding to Woods' initial tweet about politics, sexual identity, and abortion, he was voluntarily thrusting himself into a milieu of public controversies. Woods would almost certainly have been be required to prove that Abe List acted with actual malice. This hurdle might be fatal to Woods' claim.

Portia Boulger, on the other hand, would have likely been deemed a private figure and only needed to prove the lower negligence standard. She was not well known and was not a party to the protest of Donald Trump's campaign spot. It was Woods who thrust her into the controversy.

V. PRACTICAL LESSONS AND RECOMMENDATIONS

America's long-standing and evolving defamation law is sufficiently robust for the challenges faced by the medium of social media as it has with prior communication revolutions. It will, however, need to address the changes with respect to the sheer speed and volume of communications. The two cases of James Woods illustrate a few important lessons for practitioners, educators, legislators, and courts alike.

A. *Litigation as a Symbolic Gesture*

One glaring problem with our legal system is the enormous cost of defending litigation. When a corporation or a wealthy plaintiff sues an unknown John Doe defendant for defamation, those suits are often not even arguably about recovering money damages but instead are brought for symbolic reasons.[107] In the Abe List case, Woods' did not sue an unknown plaintiff because of a short, off-the-cuff biting remark that inured Woods' reputation. Abe List's tweet was a one-liner measly insult akin to the insults Woods dishes out on a weekly basis. It was an off-hand tweet that no one

[106] Raymond Placid, *Twibel: The intersection of Twitter and libel. Florida Bar Journal*, 90 FLA. B.J. 32, __ (2016).
[107] Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace,* 4 DUKE L.J. 855, 859-60 (2000).

would have ever given second thought to if Woods had not brought it so publicly to light. Woods' lawsuit was not an effort to recover for actual injuries to his reputation; it was symbolic.

It appears that Woods used the lawsuit to bully his critics into silence, which is consistent with his Tweeting persona and style. Woods' attack-dog, bully mentality was laid bare when Abe List's attorney tweeted that Abe List had died during the litigation. Instead of showing any grace or empathy, Woods tweeted that he hoped that Abe List had died "Screaming my name."[108] Woods' tweet that he would follow anyone who defamed him "to the bowels of Hell" reinforces his brand message – he sued Abe List to prove that he is an apex predator among Twitter trolls.

Although Woods would have most certainly lost the Abe List litigation on its merits if it had been fully litigated, he ultimately won his symbolic fight because he had money and stomach to continue litigating against a dead defendant.[109] Even if Woods had prevailed, most Twitter users are not financially able to pay a sizable judgment, especially after incurring the legal fees to defend against a lawsuit by a wealthy celebrity. In the end, many, if not most, Twitter trolls are likely judgment-proof.[110] The expense of a lawsuit combined with the potential for a significant judgment often creates an uneven playing field in which the party with deeper pockets can financially ruin the other party simply by forcing the defending party to rack up litigation expenses to defend the claim.[111]

B. *Context, Forethought, and Punctuation Might Be Determinative*

Users of social media would be well-suited to take a few seconds to pause and reflect on the precise language, citation, and punctuation of their post before hitting send. Just because someone is engaging in a new, evolving, and often rough-and-tumble speech community, the statements made in that arena are still subject to defamation laws. Even though a Twitter

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[108] Eriq Gardener, *James Woods Cheers Dropped Appeal from Dead Defendant in $10M Defamation Suit*, HOLLYWOOD REP. (Oct. 21, 2016, 10:22 AM), http://www.hollywoodreporter.com/thr-esq/james-woods-cheers-dropped-appeal-940364.

[109] Lidsky, 49 DUKE L.J. at 875-76 (chronicling the difficulties of bring a defamation action and reporting that only thirteen percent of defamation plaintiffs succeed in a defamation action).

[110] *Id.*

[111] Ellyn Angelotti, *Twibel Law: What Defamation and its Remedies Look Like in the Age of Twitter*. 13 J. HIGH TECH. L. 433 (2012). To date, although there have been relatively few lawsuits alleging defamation on Twitter that have gone to trial; there are a number that have settled. For example, after getting one Twitter defamation claim dismissed on appeal, Courtney Love settled two similar lawsuits for over $700,000. *See* Patrick Hunt, *Tortious Tweets: A Practical Guide to Applying Traditional Defamation Law to Twibel Claims*. 73 LA. L. REV. 559, 559-600 (2013).

post may seem temporary and fleeting, it can be retweeted and spread lightning fast throughout the Twittersphere. Despite their fleeting appearance, tweets are easily saved, copied, and discovered through a simple internet search.[112]

The more factually-based a critical online post is, the more likely it will be considered defamatory. The more opinion-based, absurd, and farcical a post is, the more likely it will fall within long-standing First Amendment exceptions to defamation.[113] Of course, this does not mean that someone can be liable for tweeting a truthful statement; truth is always a defense to defamation.[114] But, it does mean that a poster needs to take care how a sharply critical post is framed and written. Furthermore, if a poster is uncertain about the accuracy of a tweet, it would be prudent to include a link to the original source. As a Federal District Court Judge for the Southern District of New York explained, "[t]he hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law, because it has become a well-recognized means for an author or the Internet to attribute a source."[115]

The Boulger lawsuit is also an important reminder that punctuation and wording matters. The question mark at the end of the Nazi tweet was sufficient enough, at least in Ohio federal court, for the judge to conclude that the tweet was subject to two interpretations, one defamatory and the other not. This distinction was determinative and resulted in the lawsuit being dismissed.

Whether a statement is defamatory depends on the language used, the context, the audience, and the knowledge and understanding of the speaker. Because these are often fact-based questions, lawsuits may not be dismissed early in a lawsuit at the motion stage. Rather, where a factual dispute exists, defamation lawsuits will likely be decided by the jury.[116]

Finally, in the world of Twitter, it may be difficult to distinguish between an injury arising from a series of ongoing troll-like statements. Although one tweet amongst a barrage of trolling and bullying tweets might technically rise to the level of defamation, the larger injury may be caused by the sheer volume of negative tweets and not the individual tweet. When considering the law and prohibitive cost of prosecuting and defending defamation lawsuits, this is technical difference may make a real-world difference for anyone seeking a remedy.

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[112] Cory Batza, *Trending Now: The Role of Defamation Law in Remedying Harm from Social Media Backlash*, 44 PEPP. L. REV. 429 (2017).
[113] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Milkovich v. Lorain Journal Co., 497 U.S. 1, 19-20 (1990).
[114] N.Y. Times v. Sullivan, 376 U.S. 254, 267 (1964).
[115] Adelson v. Harris, 973 F. Supp. 2d 467, 484 (S.D.N.Y. 2013).
[116] Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

C. *Robust Mechanisms are Needed to Resolve Disputes Early*

The Woods' lawsuits highlight that that the Twitter community "functions at a lightning-fast speed, while traditional defamation law suits often take a very long time to litigate."[117] It is critical for legislators and courts to develop early robust mechanisms to evaluate defamation claims early in the proceedings. Courts need to recognize that SLAPP statutes are drafted to be construed broadly and treat SLAPP motions seriously to dismiss non-meritorious claims.[118] Courts also need to evaluate alleged defamatory statements based on the actual words used as well as the specific and general context that they were tweeted. As with the Ohio court in the Boulger lawsuit, consideration should be given to the innocent construction rule is appropriate when evaluating early motions to dismiss questionable social media defamation claims.

In situations where a social media post or posts are clearly defamatory, quick-moving temporary restraining order and preliminary injunction motions are vital to prevent or enjoin defamation. Another approach is to continue to push Twitter, Facebook, and other social media providers to establish and refine easy to use, prompt, and robust mechanisms to report and take down defamatory material. These procedures may be the quickest and most effective way to respond to a defamatory post or series of posts.[119]

D. *The Lasting Solution May Be Informal and Extra-Judicial*

The quickest and most effective solution to a social media attack is usually not through the court system. Many bloggers will retract, edit, or delete incorrect information if they are contacted personally or through a lawyer. Internet users can often report defamatory posts to the domain registrar, the hosting company, the social media network, or Google. Users can also respond directly to a statement to correct the information or put the issue in context. This, of course, risks a back-and-forth with the initial poster.

Finally, members of online communities play a significant role in shaping the tone and nature of their communities. They have the ability to set community standards and self-police the bad behavior on the sites.[120] While users need to understand the legal limitations of their online speech, their analysis should not stop after determining whether a post is defamatory.

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[117] Angelotti, *supra* note 111, at 504-05.
[118] Cal. Code Civ. Proc. §425.16.
[119] Twitter Rules and Policies, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Mar. 16, 2019).
[120] Angelotti, *supra* note 111, at 506.

They also need to use their best judgment and be guided principles of fairness, justice, and ethics in their online speech.

VI. CONCLUSION

As with any new communication medium, it takes time for the law and application of the law to catch up. Although the Authors do not foresee any radical transformation of the law of defamation as it is applied to Twitter and other social media platforms, the legal institutions need to address the unique challenges of the medium – speed and volume of messages.

The two James Woods lawsuits are illustrative of several legal and practical issues arising from defamation and insults in this new media. They show how members of the public, as participants in social media discourse, are struggling to balance defamatory speech and manage its consequences. They also show how courts struggle with legal issues involving interpretation and meaning, balancing free speech rights against the right to not be defamed, and the proper ways to evaluate defamation claims early in the litigation.

Some users, such as James Woods, appear to be using litigation as a tool to craft their public image as a bully and renegade while squashing their own critics and trolls. Others, such as Portia Bulger, are turning to the courts to address real harms to their reputation and safety while struggling to respond to being unwittingly thrust to the national stage. As with all litigation, the incredible expense and risk of litigation often drive how legal actions will be resolved – regardless of the relative merits of the lawsuit. Those with substantial financial resources have the luxury to fully litigate their claims but may find that they are unable to collect a judgment from the defendant. In these cases, litigation may be pursued as a symbolic strategy, rather than a good faith effort to obtain a legal or equitable remedy. This issue is not new, but social media amplifies these disparities. We need to be mindful of the consequences that we see, be vigilant for consequences that have not yet emerged, and be proactive to ensure the legal and justice system evolves in ways that contribute positively to the society we want to have.