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Milkovich v. Lorain Journal Co.: Wrestling With Opinion

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NOTE

MILKOVICH v. LORAIN JOURNAL CO.: WRESTLING WITH OPINION

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I. INTRODUCTION

For centuries, the common law has provided a means of redress for injuries to a person's name and reputation.¹ This protection is predicated on the belief that a person's repute is a valued possession, and any damage to it should be compensated.² A judgment against the defamant is considered adequate vindication for this wrong.³

In the United States, however, because of the concomitant interest in free speech and liberty of expression,⁴ the ability to recover for damages to one's reputation, or for perceived slights to one's name, is tempered by concerns that the threat of a cause of action for defamation stifles the free exchange of ideas.⁵ Once the courts began balancing these ideals and protections, they em-

1. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2702 (1990)(citing L. ELDREDGE, *LAW OF DEFAMATION* 5 (1978)).

2. *Id.*

3. *Id.*

4. The freedom of expression clause of the first amendment provides as follows: "Congress shall make no law . . . abridging the freedom of speech or of the press; . . ." U.S. CONST. amend. I.

5. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (Constitution limits applicability of state defamation laws); cf. *infra* note 36.

barked on a constant struggle to fashion a rule or standard that would balance these interests.

In *Milkovich v. Lorain Journal Co.*,⁶ the United States Supreme Court, for the first time, directly addressed the contours of the constitutional protection to be afforded statements that solely contain opinion.⁷ The Court examined whether "an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the [f]irst [a]mendment."⁸ Specifically, at what point does the opinion of a reporter for a publication become actionable as defamatory?

This Note examines the limitations and ramifications of the Supreme Court's decision, initially focusing on the facts and procedural posture of *Milkovich*. Next, it analyzes the Court's reasoning and conclusion, as contrasted with the reasoning in Justice Brennan's dissent. Finally, this Note addresses the impact of this decision.

II. *MILKOVICH v. LORAIN JOURNAL CO.*

A. *The Underlying Facts*

J. Theodore Diadiun wrote an article in the Willoughby News-Herald,⁹ an Ohio newspaper, which contained allegations that a local high school wrestling coach, Michael Milkovich, and the area's public school superintendent, H. Don Scott, perjured themselves in a court proceeding.¹⁰ After nearly fifteen years of litigation,¹¹ and three petitions for certiorari,¹² the United States Supreme Court granted review.

In 1974, the Maple Heights High School wrestling team, under Milkovich's tutelage, met to compete with the Mentor High School team.¹³ During the match an altercation erupted involving players and fans; some Mentor High School students sustained injuries.¹⁴ The Ohio High School Athletic Association (OHSAA) conducted a hearing on the incident.¹⁵ Milkovich and Scott testified at the

6. 110 S. Ct. 2695 (1990).

7. *Id.* at 2708 (Brennan, J., dissenting).

8. *Id.* at 2707.

9. *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 145, 416 N.E.2d 662, 664 (1979).

10. 110 S. Ct. at 2697-98.

11. *Id.* at 2698.

12. *Id.* at 2698 n.1; see also *infra* notes 39 & 49.

13. *Id.* at 2698.

14. *Id.*

15. *Id.*

hearing.¹⁶ OHSA placed the Maple Heights team on one year's probation and declared the team ineligible for the 1975 state tournament.¹⁷ Further, OHSA censored Milkovich for his actions during the incident.¹⁸

In response to OHSA's determination, several parents along with members of the wrestling team sought a court order restraining enforcement of OHSA's determination, alleging that during OHSA's proceedings the parents and wrestlers were not afforded their due process rights.¹⁹ Milkovich and Scott also testified in that judicial proceeding.²⁰ The court enjoined OHSA's probation and ineligibility orders on due process grounds.²¹

The court's decision prompted Diadiun to write the column in the Willoughby News-Herald, Mentor High School's hometown newspaper.²² The column, a signed editorial,²³ proclaimed in its headline that "Maple beat the law with the 'big lie,'" ²⁴ the headline on the continuing page stated that "Diadiun says Maple told a lie."²⁵ Although the article correctly reported that the court granted the injunction on due process grounds, it implied that Milkovich failed in his primary function as an educator,²⁶ asserting that the lesson the students learned from the incident was that "[i]f you get in a jam, lie your way out."²⁷ In addition, the article avowed that any observer "knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."²⁸ Diadiun based his allegations on what he believed

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*; Barrett v. Ohio High School Athletic Ass'n, No. 74 Civ. 09-3390 (Ohio Ct. Com. Pleas Jan. 7, 1975) (unreported), cited in Milkovich v. News-Herald, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984).

20. 110 S. Ct. at 2698.

21. *Id.*

22. *Id.* at 2711 (Brennan, J., dissenting); Milkovich v. News-Herald, 15 Ohio St. 3d at 292, 473 N.E.2d at 1192.

23. 110 S. Ct. at 2713 (Brennan, J., dissenting).

24. *Id.* at 2698.

25. *Id.*

26. *Id.* at 2698-99 n.2.

27. *Id.* at 2698.

28. *Id.* Milkovich alleged that the following passages of the column contained defamatory material:

[A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

A lesson which, sadly, in view of the events of the past year, is well they learned early.

It is simply this: If you get in a jam, lie your way out.

were discrepancies between Milkovich's and Scott's testimony at the OHSA proceeding and the hearing before the trial court.²⁹ Diadiun's article sparked this prolonged litigation.³⁰

B. Procedure Below

Milkovich and Scott³¹ instituted separate defamation actions against Diadiun, the newspaper, and its owner, the Lorain Journal Company. Milkovich and Scott contended that the article defamed them and accused them of perjury, an indictable offense under Ohio law.³² Milkovich further claimed that he had been damaged in his profession as coach and teacher.³³ In short, Milkovich asserted that the statements amounted to libel per se.³⁴

At trial, the court granted defendants' motions for a directed verdict, reasoning that Milkovich failed to make a showing that the

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott.

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not.

110 S. Ct. at 2698; *Milkovich v. News-Herald*, 46 Ohio App. 3d 20, 21, 545 N.E.2d 1320, 1321-22 (1989).

29. 110 S. Ct. at 2699 n.2.

30. *Id.* at 2699.

31. Scott is not a party to this proceeding. In Scott's separate defamation action against Diadiun and Lorain Journal Company, the trial court entered a summary judgment in defendants' favor. *Id.* at 2700. The court of appeals affirmed the judgment. *Scott v. News-Herald*, 25 Ohio St. 3d 243, 244, 496 N.E.2d 699, 701 (1986). On appeal, the Ohio Supreme Court affirmed, holding that the column was "constitutionally protected opinion." *Id.* at 254, 496 N.E.2d at 709.

Because the *Scott* court overruled its earlier decision in *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984), this decision later prompted an Ohio Court of Appeals to affirm a summary judgment against Milkovich, favoring Diadiun and Lorain, 110 S. Ct. at 2701 (citing *Milkovich v. News-Herald*, 46 Ohio App. 3d 20, 23, 545 N.E.2d 1320, 1324 (1989)), leading to the United States Supreme Court granting certiorari review. 110 S. Ct. at 2701.

32. 110 S. Ct. at 2699.

33. *Id.* at 2699-2700.

34. *Id.* at 2700. "A publication is libelous *per se* when the words are of such a character that an action may be brought upon them without the necessity of showing any special damage, the imputation being such that the law will presume that one so slandered must have suffered damage." BLACK'S LAW DICTIONARY 825 (5th ed. 1979).

article was published with "actual malice"³⁵ as required by *New York Times Co. v. Sullivan*.³⁶ The Ohio Court of Appeals reversed the order and remanded the case, holding that there had been sufficient showing of actual malice to submit the question to the jury.³⁷ Defendants' appeal to the Ohio Supreme Court was dismissed,³⁸ and the United States Supreme Court denied certiorari.³⁹

On remand, the trial court granted a motion for summary

35. *Id.* The trial court, in granting a directed verdict for defendants, found that the evidence failed "to establish by clear and convincing proof that the article which was the subject of this action was published with knowledge of its falsity or in reckless disregard of the truth," *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 144, 416 N.E.2d 662, 664 (1979).

36. 376 U.S. 254 (1964). In granting the directed verdict, the trial court determined that under *Sullivan*, *Milkovich*, a public figure, had not shown that the article was published with actual malice. *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d at 149, 416 N.E.2d at 666.

In *Sullivan*, the United States Supreme Court examined an action in common law libel stemming from criticisms of a public official in his official capacity. 376 U.S. at 256, 268. This was the first case in which the Court considered constitutional limitations on libel actions. *Id.* at 269.

Sullivan examined the origins and purpose of the first amendment, namely, to secure a free exchange of ideas for "the bringing about of political and social changes desired by the people." The *Sullivan* Court held that the first amendment requires a rule prohibiting recovery in a defamation action by a public official unless he can prove actual malice. *Id.* at 269 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)).

The Court defined actual malice as knowledge of the falsity of the statements or reckless disregard for the truth. *Id.* at 280-81. This holding raised the threshold for recovery for defamation by a public official.

37. 110 S. Ct. at 2700 (citing *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 416 N.E.2d 662 (1979)). The Ohio Court of Appeals relied on facts, adduced at trial, that demonstrated that Diadiun had not attended the hearing about which he was writing. *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d at 145, 416 N.E.2d at 665. Further, Mr. Diadiun, during cross-examination revealed the following:

Q. Isn't it a fact, Mr. Diadiun, that you never read any transcript of what occurred at that trial until after you published the article?

A. Yes.

Q. Didn't you think it was necessary for you to read that decision [of Judge Paul Martin of the Court of Common Pleas of Franklin County] before you published such an article?

A. Like I said, I knew the background of the whole case. I knew what Dr. Meyer told me went on at that trial. I didn't feel that I needed [to]—

Q. The fact of the matter is, you never took the trouble to find that decision and read it, did you?

A. I didn't find the decision, no.

Q. You didn't find it necessary to read it?

A. No.

Milkovich, 65 Ohio App. 2d at 145-46, 416 N.E.2d at 665. The court of appeals stated that based on these facts, a jury could conclude that the article was published with "actual malice." See *supra* note 36 and *infra* notes 65 & 66.

38. The court found the case did not present a substantial constitutional question. 110 S. Ct. at 2700.

39. *Id.* at 2700; 449 U.S. 966 (1980).

judgment in defendants' favor.⁴⁰ The court rested its decision on *Gertz v. Robert Welch, Inc.*,⁴¹ finding that the column expressed an opinion and was not actionable as libel under constitutional law principles.⁴² Milkovich, as a public figure, failed to make a prima facie showing of actual malice.⁴³

The Ohio Court of Appeals affirmed the decision.⁴⁴ On appeal, however, the Ohio Supreme Court reversed and remanded.⁴⁵ The court determined that Milkovich was neither a public figure nor a public official.⁴⁶ Further, the court found that the statements in

40. 110 S. Ct. at 2700.

41. 418 U.S. 323 (1974). The *Gertz* holding symbolizes two significant changes in the area of libel law: (1) persons who seek public attention are public figures and must prove actual malice under the *New York Times v. Sullivan* holding in order to recover damages in an action for libel, 418 U.S. at 346; and (2) the state's interest in allowing redress for private individuals is so great that the state may define the appropriate standard of liability, so long as it requires at least some showing of fault. *Id.*

The *Milkovich* trial court determined that the coach was a public figure, reasoning under *Gertz* that he had been thrust into a public controversy. *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 294, 473 N.E.2d 1191, 1192 (1984); see *Gertz*, 418 U.S. at 352. The court found that as a public figure, Milkovich had not made a prima facie case of actual malice. *Milkovich*, 110 S. Ct. at 2700; *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984). On appeal, the Ohio Supreme Court reversed and remanded. *Id.* at 294-299, 473 N.E.2d at 1193-96. See *infra* notes 65 & 66.

42. 110 S. Ct. at 2700.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (citing *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984)). In the preliminary stages of the proceedings, the trial court found that Milkovich was a public figure. *Milkovich v. News-Herald*, 15 Ohio St. 3d at 293, 473 N.E.2d at 1192. Milkovich did not appeal this finding until after the court of appeals reversed a directed verdict in defendants' favor and remanded the case to the trial court. *Id.* at 293, 473 N.E.2d at 1193. On remand, the trial court entered summary judgment for defendants based on its conclusion that Diadiun's article was protected as an expression of opinion. *Id.* The court of appeals affirmed the summary judgment. *Id.* at 293, 473 N.E.2d at 1193. The Ohio Supreme Court reversed. *Id.* at 296, 473 N.E.2d at 1195. Following the reasoning in *Gertz*, the Ohio Supreme Court determined that even though Milkovich was recognized and admired in his community, his position did not put him at the forefront of public controversies and he could not exert influence in the resolution of these controversies. *Id.* at 297, 473 N.E.2d at 1195.

However, in its subsequent opinion, *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986), relying on Justice Brennan's reasoning in *Lorain Journal Co. v. Milkovich*, 106 S. Ct. 322 (1985) (Brennan, J., dissenting), the Ohio Supreme Court overruled *Milkovich v. News-Herald*, "in its restrictive view of public officials." *Scott*, 25 Ohio St. 3d at 248, 496 N.E.2d at 704. Based on the *Scott* decision, the trial court granted summary judgment in defendants' favor. *Milkovich v. News-Herald*, 46 Ohio App. 3d 20, 21-22, 545 N.E.2d 1320, 1322 (1989). The court of appeals, reviewing the second summary judgment, did not reach the issue whether *Scott* rendered Milkovich a public figure, relying solely on the determination in *Scott* that the article contained constitutionally protected opinion. *Id.* at 23-24, 545 N.E.2d at 1324. Because the court of appeals determined that *Scott* was binding and *Milkovich* no longer applied, the court never directly addressed the

the article were "factual assertions as a matter of law, and [were] not constitutionally protected as the opinions of the writer. . . ."47 The court concluded that Diadiun's statements branded Milkovich a perjurer.⁴⁸ The United States Supreme Court again denied certiorari review.⁴⁹

On remand, the trial court granted a second motion for summary judgment in defendants' favor.⁵⁰ The Ohio Court of Appeals⁵¹ affirmed this order,⁵² relying on an Ohio Supreme Court decision that distinguished between statements of fact and opinion,⁵³ and held that opinion statements are absolutely privileged under the first amendment.⁵⁴ Because this determination created a constitutional protection for opinion statements under the law of defa-

issue of Milkovich's status as a public or private figure plaintiff as affected by *Scott*.

The United States Supreme Court concludes in *Milkovich* that *Scott*'s references to Milkovich are dicta. *Milkovich*, 110 S. Ct. at 2695, 2701-02 n.5. Further, because the Ohio Court of Appeals did not reach the issue whether Milkovich was a public figure, the Ohio Supreme Court's decision in *Milkovich* is still the law to be applied to Milkovich. The Supreme Court did not address this issue, leaving its determination to the Ohio Supreme Court. *Id.*

47. 110 S. Ct. at 2700. The court declined to establish a per se rule protecting opinion statements. *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 298, 473 N.E.2d 1191, 1196 (1984).

48. 110 S. Ct. at 2700. The court reasoned that the statements were factual assertions because nothing in the article alerted the reader that he was reading the author's opinion. *Milkovich v. News-Herald*, 15 Ohio St. 3d at 299, 473 N.E.2d at 1197 ("The plain import of the author's assertions is that Milkovich, *inter alia*, committed the crime of perjury in a court of law.").

49. 110 S. Ct. at 2700.

50. 110 S. Ct. at 2701. Defendants claimed that the decision in *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986), established that the article in question was opinion, privileged under the first amendment. *Milkovich v. News-Herald*, 46 Ohio App. 3d 20, 22, 545 N.E.2d 1320, 1323 (1989).

51. While Milkovich was prosecuting his case, *Scott* was also appealing adverse rulings. Two years after it decided *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984), the Ohio Supreme Court reversed itself, and upheld a summary judgment against *Scott*, holding that Diadiun's article was constitutionally protected opinion." 110 S. Ct. at 2700; *Scott v. News-Herald*, 25 Ohio St. 3d at 254, 496 N.E.2d at 709. The *Milkovich* court of appeals was then bound by this decision. *See supra* note 46 and accompanying text.

52. 110 S. Ct. at 2701.

53. *Id.* at 2700; *see supra* note 51 and accompanying text. The court adopted the totality of the circumstances test, elaborated in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). The test considers the following four factors in determining whether a statement is fact or opinion: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared. *Scott v. News-Herald*, 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 706 (1986).

54. In *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986), the Ohio Supreme Court determined that the article written by Diadiun was opinion, *id.* at 254, 496 N.E.2d at 701, absolutely immune from liability under the first amendment. *Id.* at 250, 496 N.E.2d at 705.

mation, the United States Supreme Court granted certiorari review.⁵⁵

III. DISCUSSION

A. *The Majority*

The United States Supreme Court narrowly framed the issues under review as follows: 1) whether there is a constitutional privilege for opinion statements; and 2) whether a reasonable factfinder could conclude that the statements in the Diadiun column implied an assertion that petitioner Milkovich perjured himself in a judicial proceeding.⁵⁶ The Court determined that a reasonable factfinder could reach this conclusion and reversed the summary judgment in defendants' favor.⁵⁷ The Court declined to hold that there is a constitutional privilege for opinion statements.⁵⁸ The Court also held that Diadiun's statements were "sufficiently factual to be susceptible of being proved true or false."⁵⁹ Writing for the majority,⁶⁰ Justice Rehnquist's reasoning is carefully crafted to avoid overinclusive determinations or resolutions.

Justice Rehnquist began by tracing the common law history of defamation actions, and the development of constitutional inroads into that action. This analysis exposed the effect these developments have on defendants' request for a first amendment privilege for opinion statements under defamation law.⁶¹ The majority refuted the Ohio Supreme Court's allusion that the article could be merely figurative or hyperbolic,⁶² and focused on the serious nature of the perjury charge.⁶³

The Court's decision is well reasoned in view of defendants' request that the Court create a constitutional privilege for defama-

55. 110 S. Ct. at 2701.

56. *Id.* at 2707.

57. *Id.* at 2707-08.

58. *Id.* at 2707.

59. *Id.*

60. All the Justices, except Brennan and Marshall, joined Justice Rehnquist's opinion.

61. 110 S. Ct. at 2705.

62. In its *Scott* opinion, the Ohio Supreme Court states that defendant's article "appeared on the sports page—a traditional haven for cajoling, invective, and hyperbole." *Scott*, 25 Ohio St. 3d at 253, 496 N.E.2d at 708.

63. Justice Rehnquist concluded: "This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression." 110 S. Ct. at 2707. *See also* *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 64 (2d Cir. 1980) (A person should not be able to "escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think.'").

tory statements which are categorized as opinion, not fact. The Constitution affords protection against defamation actions brought by public officials when the alleged defamatory or false statements relate to the person's official conduct, or conduct displayed in the exercise of official duties.⁶⁴ Ever mindful of the need to balance the interest of free flowing information with the individual's interest in guarding against intentional slurs of his or her name and character, the Court still allows public officials to successfully maintain actions for defamation, provided the public official plaintiff proves that the allegedly defamatory statements were made with "actual malice."⁶⁵

With this balance in mind, the Court defined actual malice as the knowledge that the alleged statement is false, or the reckless disregard for the truth.⁶⁶ This standard allows a public official to recover for damages caused by statements that are truly defamatory—those statements which falsely impugn his or her honor or character—while avoiding any chilling effect on the exchange of ideas which merely attempt to criticize some aspect of the official's official conduct within the realm of truth.⁶⁷

*Curtis Publishing Co. v. Butts*⁶⁸ extends this standard to pub-

64. *Id.* at 2703 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

65. *Id.* (citing *Sullivan*, 376 U.S. at 279-80). *See also supra* note 41.

66. *Id.*

67. Under the first amendment there can be no recovery for statements that are merely critical of official conduct absent a showing of actual malice. *Sullivan*, 376 U.S. at 279-80. This avoids hampering the free exchange of ideas in Justice Holmes' "marketplace of ideas." 110 S. Ct. at 2705 (citing *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting)).

68. 388 U.S. 130 (1967). *Curtis Publishing* is a consolidated case. Case No. 37, the case's namesake, arose from an article in which Butts, the Athletic Director for the University of Georgia, was accused of fixing a football game. The article was allegedly based on a phone conversation overheard by an informant during which Butts allegedly disclosed team secrets to an opponent.

Curtis Publishing did not rely on any constitutional arguments; rather, it asserted only truth as a defense. The jury returned a verdict in Butts' favor. On appeal to the Fifth Circuit Court of Appeals, the verdict and judgment were affirmed. The court reasoned that any constitutional defenses had been waived for failure to assert them. The trial was completed before the United States Supreme Court rendered its *Sullivan* decision.

In Case No. 150, *Associated Press v. Walker*, a former army officer who was accused in a news report of inciting an angry mob of protestors against federal marshals instituted a lawsuit for libel. Walker, who had been outspoken about physical federal intervention, was at a demonstration opposing the enrollment of a black man in the University of Mississippi. The mob began attacking the federal marshals who were present.

At trial, the Associated Press raised both truth and constitutional protections as defenses. The jury awarded compensatory and punitive damages to Walker. The trial court noted that there was insufficient evidence to support a finding of malice under *Sullivan* and struck the punitive damages award. The jury's verdict was affirmed on appeal.

The United States Supreme Court affirmed the verdict in Butts' favor, finding that

lic figures. The reasoning behind the extension is that persons in the limelight of public attention expose themselves to public scrutiny. "[T]heir fame[] shape[s] events in areas of concern to society at large."⁶⁹ Allowing commentary on their acts and behavior promotes the exchange of information for the good of the public.⁷⁰

The Supreme Court did not extend this elevated standard to private figure plaintiffs who bring defamation actions, even though the alleged defamatory statements may be of public concern.⁷¹ The Court reasoned that, unlike public officials and public figures, the average private citizen does not have access to media or publicity sources to offset the defamatory statement or material.⁷² A defamation action provides the most likely means by which private citizens may redress any harm done to their reputation. Overly restricting that action effectively bars the private plaintiff from redress.⁷³

The Court nevertheless imposes some restrictions on all defamation actions in order to safeguard constitutional protections. The first restriction precludes the states from imposing liability unless a plaintiff can show some fault on the part of the defendant.⁷⁴ If a plaintiff is a public figure or official, this showing of fault requires proof by clear and convincing evidence that the defendant acted with malice.⁷⁵ The private individual need only demonstrate

although Butts was a public figure, he could recover for defamatory falsehoods based "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Curtis Publishing*, 388 U.S. at 155. The Supreme Court reversed the *Walker* verdict. Walker's political prominence and outspoken behavior on the issue rendered him a public figure. Walker succeeded in demonstrating that the Associated Press' techniques were shoddy or unprofessional.

69. 110 S. Ct. at 2703 (quoting *Curtis Publishing*, 388 U.S. at 164). The Court found that public figures, unlike private individuals, have exposed themselves to possible comments about their persons: "[More importantly,] public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual." 110 S. Ct. at 2704 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. at 344-45).

70. *Id.* at 2706.

71. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

72. "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 2704 (citing *Gertz*, 418 U.S. at 344-45).

73. 110 S. Ct. at 2706.

74. *Id.* at 2706 (citing *Gertz*, 418 U.S. at 347-48). This measure is meant to allow the states the ability to provide redress for its citizens' wrongs, while shielding defendants from strict liability for defamation. *Gertz*, 418 U.S. at 347-48.

75. 110 S. Ct. 2703-04. For a discussion of the *Sullivan* and *Curtis Publishing* decisions, see *supra* notes 67 & 68.

some degree of fault.⁷⁶ The second restriction precludes the recovery of presumed or punitive damages unless the plaintiff can prove actual malice as defined in *Sullivan*.⁷⁷

Against this historical background, Justice Rehnquist addressed the request to create a "[f]irst [a]mendment-based protection for defamatory statements which are categorized as 'opinion' as opposed to 'fact.'"⁷⁸ In essence, defendants argued that because the statements in the article solely expressed Diadiun's opinion, and because Diadiun had no factual basis for the assertion that Milkovich perjured himself, the statements were privileged expression. The author, therefore, could not be penalized for merely expressing an opinion.

The Court rejected this argument, reasoning that it would create an "artificial dichotomy" in the analysis of allegedly defamatory statements on the basis of their classification as either opinion or fact.⁷⁹ The Court first reasoned that an analysis of any statement on a matter of public concern, alleged to be defamatory, must begin with an inquiry into whether the statement is provable as false, not whether it is opinion.⁸⁰ The dissent, authored by Justice Brennan, agreed with this portion of the opinion.⁸¹

Justice Rehnquist articulated the second inquiry concerning an allegedly defamatory statement as follows: Can the statement "reasonably have been interpreted as stating actual facts"?⁸² The purpose for this second inquiry is to remove from the realm of defamation any statements that may be viewed as strictly colorful, rhetorical or hyperbolic.⁸³ These statements, greatly valued in discourse and debate, add significantly to free exchange in the "marketplace of ideas."⁸⁴ To submit these statements to the penalties of defamation may lead to undesired repercussions. It may give rise

76. *Id.* at 2704.

77. *Gertz*, 418 U.S. at 350. This measure insures that the defamation actions will not have a chilling effect on the media.

78. 110 S. Ct. at 2705.

79. *Id.* at 2706. The Ohio Supreme Court, after determining that opinion evidence was privileged, stated that the first inquiry in a defamation action should be whether the statements are fact or opinion. *Scott v. News-Herald*, 25 Ohio St. 3d 243, 249-50, 496 N.E.2d 699, 705-06 (1986).

80. 110 S. Ct. at 2706.

81. *Id.* at 2708-09 (Brennan, J., dissenting). The dissent agreed that "only defamatory statements that are capable of being proved false are subject to liability under state libel law." *Id.*

82. *Id.* at 2705 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

83. *Id.*

84. See *supra* note 67 and accompanying text. The Court recognized that rhetoric and hyperbole did have a place in the realm of intellectual exchange. 110 S. Ct. at 2706.

to defamation actions based on statements of exaggeration or absurdity, statements that are not truly meant to be representative of, referring to, or directed at, anyone. This might have a "chilling effect" on public dissemination of information; constitutional defamation law is designed to avoid this result.⁸⁵ Under the constitutional defamation analysis, statements of exaggeration or imagination do not defame because they are recognized as imaginative or exaggerated by the recipient of the communication.⁸⁶

The *Milkovich* majority determined that the allegations of perjury raised in Diadiun's article do not fall within the protection provision for "statements that cannot 'reasonably [be] interpreted as stating actual facts'";⁸⁷ rather, they are statements susceptible of being proved true or false.⁸⁸ A comparison of the testimonies at the OHSA proceeding and before the trial court could verify the perjury charge.⁸⁹

The Court considered the impact and style of Diadiun's article in its analysis.⁹⁰ The Court also adopted the analysis of the Ohio Supreme Court, which determined that the impact of the allegation in the column could be no less than to assert that Milkovich lied at the hearing after having sworn to tell the truth.⁹¹ The Court then weighed the factuality of the statements and inquired into the circumstances surrounding them. Based on this analysis, the Court concluded that Diadiun's statements were defamatory and that Milkovich had a cause of action.⁹²

B. *The Dissent*

The dissent disagreed with the conclusion that Diadiun's statements were actionable as defamatory.⁹³ The dissent would hold that the statements cannot reasonably be interpreted as stating or implying defamatory facts about Milkovich.⁹⁴ The dissent relied on the assertion that Diadiun was not present in court during the hearing,⁹⁵ reasoning that any reader would realize that Diadiun's absence renders his statements mere conjecture or hy-

85. See *supra* note 36 and accompanying text.

86. 110 S. Ct. at 2705.

87. *Id.* (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

88. *Id.* at 2707.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 2708.

93. 110 S. Ct. at 2709 (Brennan, J., dissenting).

94. *Id.*

95. *Id.* at 2711.

perbole. The speculative nature of Diadiun's article was also evidenced by the words he used to describe the events on which he commented.⁹⁶

The dissent focused on the format of the column, as a signed editorial, and argued that "[i]t is plain from the column that Diadiun did not attend the court hearing."⁹⁷ Yet, nowhere in the article did the author mention his absence from the hearing. In fact, Diadiun's allusions to his presence at the OHSAA hearing and the wrestling meet could lead the reader to conclude the opposite—that Diadiun attended the hearing. A person who closely follows the developments of a story and who appears to be well-informed of the events is qualified to make a factual assertion about the latest events. The reasonable reader—the standard the dissent embraced—could certainly reach this conclusion.⁹⁸

Because of the column's context and the writer's bias, the perception that it was "plain" from the column that Diadiun was not at the hearing could cause the reader to surmise that "Diadiun was focused on the court's reversal of the OHSAA decision and was angrily supposing what must have led to it."⁹⁹ Therefore, because the reader could recognize this as conjecture and not as a factual statement, there was no actionability.¹⁰⁰ According to the dissent, any defamatory inference is further weakened by the author's use of signal words such as "seemed," "probably," and "apparently."¹⁰¹ These words alert the reader that the author is conjecturing.¹⁰²

Justice Brennan rejected the majority's conclusion that the article called Milkovich a perjurer. Although the dissent was not in favor of creating a separate opinion privilege, it would not impose liability on Diadiun for his uninformed opinion. Justice Brennan cited Diadiun's ignorance of legal principles¹⁰³ and stated that "[i]gnorance, without more, has never served to defeat freedom of

96. *Id.*

97. *Id.*

98. A plaintiff must prove false what a reasonable reader understands the author to have said. 110 S. Ct. at 2708.

99. *Id.* at 2712.

100. *Id.* at 2712 n.7. In *Scott*, however, the Ohio Supreme Court observed that the impact of the article was that Scott had lied under oath. *Scott v. News-Herald*, 25 Ohio St. 3d at 251, 496 N.E.2d at 707.

101. 110 S. Ct. at 2711-12.

102. *Id.* at 2712.

103. The dissenting opinion explained that Diadiun must not have realized that an injunction granted on due process grounds need not reach the veracity of the witnesses' testimony. 110 S. Ct. at 2714.

speech."¹⁰⁴ In weighing the countervailing interests of reputation and freedom of speech, the dissent favored free speech "as long as it is clear to the reader that he is being offered conjecture."¹⁰⁵

In support of its position, the dissent delineated other speculative comments which have been articulated on matters of public interest:

Did NASA officials ignore sound warnings that the Challenger Space Shuttle would explode? Did Cuban-American leaders arrange for John Fitzgerald Kennedy's assassination? Was Kurt Waldheim a Nazi officer? Such questions are matters of public concern long before all the facts are unearthed, if they ever are. Conjecture is a means of fueling a national discourse on such questions and stimulating public pressure for answers from those who know more.¹⁰⁶

While the dissent's concerns are well founded, they are not supported by the facts of this case. The dissent's examples addressed national issues; the case at hand deals with a local incident.¹⁰⁷ According to Justice Brennan, however, debate on issues of local concern can be as important to local citizens as debate on issues of national appeal. Yet the nature of the incident Diadiun reported did not rise to this magnitude, even at a local level. In addition, Brennan's examples are political or historical in nature. Diadiun's opinion does not fall into either category. The dissent used the author's bias and anger at the situation to bulwark its contention that the reader would have understood the author was engaging in conjecture. None of these examples, however, goes any further than to raise suspicion about the group or person. Diadiun's article did not question whether Milkovich lied at the court proceeding. Rather than phrase its headlines along the lines of the dissent's example, "Did Maple beat the law with a lie," the article stated affirmatively that a lie had been told. As the majority noted, there were *no* words of mitigation anywhere in Diadiun's column sufficient to align it with the example the dissent offered.

C. Discussion

The dissent's reliance on the article's context and appearance of impartiality is incorrect because it goes no further. It is insuffi-

104. *Id.*

105. *Id.*

106. *Id.*

107. The Ohio Supreme Court determined that Milkovich was not a public figure. See *supra* note 46. The Court did not address this issue.

cient to claim that the article is not defamatory because it reflects the author's bias and anger. Bias and anger, when added to Diadiun's ignorance, amount to more than ignorance. Bias and anger motivated Diadiun to write the article without having researched the specifics of what had transpired at the hearing.¹⁰⁸ This does not simply reflect an ignorance of what the law entails; rather, it implies a failure to investigate properly, or to follow accepted standards of professionalism.¹⁰⁹ Justice Brennan stated that Diadiun may be naive and may appear "foolish to lawyers," but he was not liable for defamation.¹¹⁰ This assertion is not supported by the facts in this case, however, because the author knew that the court granted the injunction on due process grounds.

There must be some responsibility to understand the facts before fueling the debate. Diadiun could have informed himself by questioning an attorney regarding the grounds for the injunction, or by checking the court record, which is available to the public. If the author of an editorial is naive about the concept of due process, should not the same be expected of its readers? Surely such erroneous debate does not contribute greatly to the "market place" or "free flow of ideas."¹¹¹

The dissent is understandably concerned with the chilling effect the application of the majority's rule will have on opinion. However, the dissent's reasoning eliminates the majority's two-fold inquiry. The majority's reasoning may be understood as follows. The assertion "[i]n my opinion John Jones lied," must be analyzed using two inquiries: (1) is the factual underpinning of the assertion—the fact upon which the assertion is based—true?; and (2) is the speaker's intention to defame John Jones?¹¹²

The second inquiry addresses actual malice¹¹³ and addresses the intent of the speaker. If the requisite element of intent is established, the private figure plaintiff may recover punitive damages.¹¹⁴ The majority's first inquiry deals with the ability of a plaintiff to state a cause of action—a plaintiff's ability to prove the statement's factual assertions as false.¹¹⁵

108. See *supra* note 28 and accompanying text.

109. See *supra* note 67 and accompanying text.

110. 110 S. Ct. at 2714 (Brennan, J., dissenting).

111. *Id.*

112. 110 S. Ct. at 2706 n.7.

113. *Id.*

114. See *supra* note 71.

115. The majority's inquiry into the factual underpinnings of the statements resembles the inquiry required by the common law defamation defense of "fair comment." See, e.g., Note, *Defamation—Actionable Statement of Fact Versus Privileged Opinion: Ollman*

The most troubling aspect of the dissenting opinion is the circumstances under which it would impose liability for defamation. Under the dissent's reasoning, a plaintiff would not have to prove that the underlying facts upon which the defamatory inference is drawn are false; rather, a plaintiff would have to prove that the inference itself is false.¹¹⁶ A plaintiff would not have a cause of action merely by demonstrating the falsity of the statement. An action for defamation would lie by demonstrating the falsity of the underlying assumption.

Justice Brennan believes that "documentary or eyewitness testimony that the speaker did not believe his own professed opinion would be required before a court would be permitted to decide that there was sufficient evidence to find that the statement was false and submit the question to a jury."¹¹⁷ This seems to change the meaning of falsity from an untruth to an untrue inference for the purpose of defamation law. It requires malice or intent by the author to draw a false inference before an action for defamation could stand. This departs from the Court's prior pronouncements on defamation, as well as from the private-public plaintiff distinction affecting the burden of proof a plaintiff must carry. Implicitly overruling *Gertz* by altering this private-public plaintiff distinction, this analysis increases the standard necessary for a finding of fault.¹¹⁸

The majority does not advocate a rule as severe as the one espoused by the dissent. Under the majority's rule, a private plaintiff may prove the factual assertion false and recover only his actual damages. In order for a jury to award presumed or punitive damages, the second inquiry must be satisfied. The second inquiry would remain the threshold for a public figure or official to state a cause of action.

In contrast, the dissent's view eliminates the first inquiry in all cases. Justice Brennan writes that "[t]he assertion Jones must prove false is that the speaker had, in fact, drawn the inference that Jones lied."¹¹⁹ Under this standard the only way to prove fal-

v. Evans, 34 KANSAS L. REV. 367, 368 (1985). At common law, opinions based on true facts were not actionable as defamatory under the defense of fair comment. *Id.* at 369. The underlying facts had to be true, *id.* at 370, and could not be motivated by hostility or ill will. *Id.*

116. 110 S. Ct. at 2710 n.4 (Brennan, J., dissenting).

117. *Id.* at 2713 n.9 (Brennan, J., dissenting).

118. *Id.* at 2710.

119. *Id.* at 2710 n.4.

sity is to prove the intent to defame.¹²⁰

Further, Justice Brennan does not make a distinction between a public or private plaintiff.¹²¹ It would seem that he would also eliminate the majority's first inquiry with respect to private figure defamation plaintiffs as well. This would require all plaintiffs to show actual malice, under the *New York Times Co.* standard, overruling the private-public distinction in *Gertz*.¹²²

If, as Justice Brennan suggested, a statement cannot be the basis for a defamation action because it is merely someone's opinion, then no statements will be susceptible to a defamation suit. Any statement can be asserted with impunity by employing the appropriate modifiers to suggest opinion is being offered. Defamation was designed to protect against unsubstantiated statements which cause injury to a person's reputation.

Statements of opinion may cause the reader to infer underlying facts. If these facts are not researched or verified, these statements only serve to damage the reputation of the subject and add nothing to public debate. Reporters should exercise care to insure that statements are grounded in more than mere opinion if they are to avoid defamatory effects.

IV. CONCLUSION.

Freedom of speech and a citizen's right to protect his or her name and reputation must be carefully balanced. Because any opinion is founded on fact, any opinion may be subject to defamation suits. This would stifle public debate. To adopt the balance suggested by the dissent would tip the scale in favor of the defendant at a point already rejected by *Gertz*.

Milkovich halts the progression in defamation law towards a complete derision of that action and affirms the Supreme Court's position as stated in its previous cases in the area of defamation.¹²³ The first amendment is one of our most precious freedoms. The interests it protects are vital and potent in our society. However, no one interest should be fostered at the expense of another to the

120. See *supra* text accompanying note 117.

121. It may be that Justice Brennan assumed it settled that *Milkovich* was a public figure. See *Lorain Journal Co. v. Milkovich*, 106 S. Ct. 322 (1985) (Brennan, J., dissenting) (denial of certiorari).

122. See *Gertz*, 418 U.S. 323 (1974) (Brennan, J., dissenting).

123. This is the conclusion reached by the concurrence in *Milkovich v. News-Herald*, 46 Ohio St. 3d 20, 24, 545 N.E.2d 1320, 1325 (1989) (Ford, J., concurring), which stated that the effect of the *Scott* decision, in conjunction with *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St. 3d 176, 512 N.E.2d 979 (1987), was to mute the cause of action of libel in Ohio.

extent that the cause of action is destroyed.¹²⁴ Individuals do not always have meaningful access to combat statements made in the media. If we do not respect an individual's reputation, and uphold the means to preserve it, we may also lose sight of the individual's substance.

In one sense, this opinion stands for the proposition that constitutional protections will not be extended to statements that are not adequately researched. It is conceivable that the Supreme Court would have taken a different view of the circumstances if Diadiun had minimally researched what transpired at the hearing, or attended it himself. His failure to do so, coupled with the strength of the statement, "Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth[,]"¹²⁵ did not allow an alternative interpretation.

Constitutional protections are available to protect the free expression of thoughts and ideas. They exist to foster exchange and uninhibited speech. In *Milkovich*, the Court declines to expand those protections to include thoughtless, injurious remarks.

*Mario J. Trespalacios**

124. 110 S. Ct. at 2715 (Brennan, J., dissenting) (citing *Sullivan*, 376 U.S. at 272). It is true that "[w]hatever is added to the field of libel is taken from the field of free debate." *Id.* However, the rights of individual citizens must not be forgotten, particularly when the citizen has no access to the media or otherwise has no way to rebut the defamatory statements. The Constitution must also protect this citizen.

125. See *supra* note 28 and accompanying text.

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