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Recent Developments: Milkovich v. Lorain Journal Co.: Opinions Are Not Protected by the First Amendment and Are Therefore Actionable under State Libel Law

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nan, Marshall and Stevens, filed a dissenting opinion and argued that the majority's holding was in direct conflict with the plain meaning of the Confrontation Clause. The dissenters attacked the majority's analogy to the admission of hearsay evidence, noting that the hearsay exceptions generally included a requirement of the unavailability of the declarant, a point which the majority seemed to ignore. *Id.* at 3174 (Scalia, J., dissenting). Concluding, the dissent stated: "The Court today has applied 'interest balancing' analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport to our findings." *Id.* at 3176 (Scalia, J., dissenting). "[T]he text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current 'widespread belief,' I respectfully dissent." *Id.* at 3172 (Scalia, J., dissenting).

The opinion of the Supreme Court in *Maryland v. Craig* validates a procedure which will greatly increase the State's ability to successfully prosecute alleged perpetrators of child abuse. Perhaps more importantly, this opinion reveals the willingness of the current Court to look beyond the literal meaning of constitutional guarantees and instead concentrate on the "essence" of the right, thereby preserving the notion of the Constitution as a flexible document.

— *Gregory J. Swain*

Milkovich v. Lorain Journal Co.: OPINIONS ARE NOT PROTECTED BY THE FIRST AMENDMENT AND ARE THEREFORE ACTIONABLE UNDER STATE LIBEL LAW

In *Milkovich v. Lorain Journal Co.,* 110 S. Ct. 2695 (1990) the United States Supreme Court held that statements of opinion are not protected by the first amendment and, therefore, are actionable under state libel law. In holding so, the Court reversed the Ohio Court of Appeals and remanded the case for a determination as to whether the statements were true or false.

Lorain Journal Co. published an article authored by J. Theodore Diadiun (hereinafter "respondents") including incriminating comments about the petitioner, Michael Milkovich, a high school wrestling coach whose team was involved in an altercation following a match. Milkovich and Scott, the school superintendent, testified at the Ohio High School Athletic Association (OHSAA) investigatory hearing and subsequent trial. Both proceedings were discussed in a journal article entitled "Maple beat the law with the 'big lie,'" along with a picture of Diadiun and the words "TD says." Among other phrases, the article contained the following passage: "Anyone who attended the meet... knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." *Id.* at 2698. Thus, Milkovich and Scott brought separate defamation actions against the respondents in Ohio State Court. *Id.* at 2699.

Milkovich alleged that the article directly damaged his occupation of coach and teacher by accusing him of committing perjury, and that this constituted libel per se. *Id.* A directed verdict was granted in favor of the respondents on the grounds that there was insufficient evidence to establish "actual malice" as required by *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). *Milkovich,* 110 S. Ct. at 2699. The Ohio Court of Appeals disagreed and the decision was reversed and remanded. *Id.* at 2700.

On remand, the trial court granted the respondent's motion for summary judgment, holding that the article constituted opinion constitutionally protected from a libel action. Alternatively, the court found that Milkovich, as a public figure, failed to make out a prima facie case of actual malice. The court of appeals affirmed. *Id.*

On appeal, the Supreme Court of Ohio found that Milkovich was neither a public figure nor a public official. The court also held that the statements were factual assertions as a matter of law and not constitutionally protected as the opinions of the writer. *Id.*

Two years later, the Ohio Supreme Court reversed its position in Scott's defamation action, finding that the column was constitutionally protected opinion. *Id.* The *Scott* court, in ascertaining whether the column was fact or opinion under the totality of the circumstances, applied the four factor analysis established by the Court of Appeals for the District of Columbia in *Ollman v. Evans,* 750 F.2d 970 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1127 (1985). *Milkovich,* 110 S. Ct. at 2700. Those factors were "(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.'" *Id.* (quoting *Scott v. News-Herald,* 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 706 (1986)).

Although the *Scott* court determined that the first two factors indicated that the statements at issue were assertions of fact, the court held that based on the third and fourth factors the article was opinion as a matter of law. *Id.* With respect to the third, "general context of the statement," factor, "the large caption 'TD says'... would indicate to even the most gullible reader that the article was, in fact, opinion." *Id.* (quoting *Scott,* 25 Ohio St. 3d at 252, 496 N.E.2d at 707). With respect to the fourth factor, the "broader context in which the statement appeared," the court reasoned that because the article appeared on a sports page — 'a traditional haven for cajoling, invective, and hyperbole,' that article would probably be construed as opinion. *Id.* at 2701 (quoting *Scott,* 25 Ohio St. 3d at 253-54, 496 N.E.2d at 708). As a result of the *Scott* decision, the Ohio Court of Appeals upheld a summary judgment against Milkovich. *Id.* An appeal to the Supreme Court of Ohio was dismissed for want of a substantial constitutional question, and the United States Supreme Court granted certiorari to consider the Ohio court's recognition of a constitutionally required opinion exception under the first amendment.

The Supreme Court began its analysis by discussing the development of defamation law under the common law. The Court first stressed the importance of allowing a person to vindicate his good name while affording redress for harm caused by defamatory statements. *Id.* at 2702.

At common law, a defamed private figure needed only to prove a false publication which subjected him to "hatred, contempt, or ridicule." *Id.* (quoting *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 370 (1974) (White, J., dissenting)). The distinction between fact and

opinion, the Court explained, did not exist. *Id.*

The Court explained, however, that the affirmative defense known as "fair comment" was incorporated into common law, applying only to expressions of opinion. This principle, "afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Id.* at 2703 (quoting 1 F. Harper & F. James, Law of Torts § 5.28 (1956)). The Court found that the purpose of "fair comment" was to balance free and uninhibited discussion of public issues with the need to redress injury to reputation caused by invidious irresponsible speech. *Id.*

To further protect freedom of speech, freedom of the press and uninhibited debate, the Court explained, it began to require public officials to prove defamatory statements were made with 'actual malice.' *Id.* (citing *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964)). The *New York Times* 'actual malice' test was later extended to public figures, defined as those persons "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* (quoting *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967)). The required standard of proof for both public officials and public figures, the Court noted, was clear and convincing evidence. *Id.* at 2703-04 (citing *Gertz,* 418 U.S. at 342).

The distinction between public and private individuals, the Court reasoned, was predicated not only on the fact that public persons voluntarily exposed themselves to the increased risk of defamation, but also had greater opportunity to counteract any false statements through effective communication channels. *Id.* at 2704 (citing *Gertz,* 418 U.S. at 344-45). However, the Court did not extend the 'actual malice' standard to private persons concerning matters of public interest. *Id.* (citing *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971)).

The Court discussed further limitations placed on the damages recoverable in libel actions. First, liability could not be imposed without some showing of fault. *Id.* Second, punitive damages were not recoverable without a showing of 'actual malice.' *Id.* Finally, the Court had held that it could no longer be presumed that defamatory speech was false, as under common law. Moreover, the burden of showing falsity and fault was on the allegedly defamed plaintiff and not on the media defendant who previously was required to prove truth. *Id.* (citing *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 776 (1986)).

The Court then noted its recognition of constitutional limitations on the type of speech which could serve as a basis for a defamation action. *Id.* Constitutionally protected speech, not subject to defamation law included "loose figurative speech," "merely rhetorical hyperbole," as well as, "lusty and imaginative expression of contempt." *Id.* at 2705 (quoting *Letter Carriers v. Austin,* 418 U.S. 264, 284-86 (1974)).

Milkovich, attempted to persuade the Court to recognize an additional protection for statements characterized as opinions as opposed to fact. He relied on dictum from *Gertz* which basically reiterated Justice Holmes' "marketplace of ideas" concept. *Id.* Yet the argument, equating "opinion" with "idea," was rejected by the Court, which stated that the passage relied upon from *Gertz* was not "intended to create a wholesale defamation exception for anything that might be labeled 'opinion.'" *Id.*

The Court noted that expressions of opinion may often imply an assertion of objective facts. *Id.* For example, the statement "[i]n my opinion Jones is a liar," the court believed could cause as much damage to one's reputation as the statement, "Jones is a liar." *Id.* at 2706. "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" *Id.* (quoting *Cianci v. New Times Publishing Co.,* 639 F.2d 54, 64 (2d Cir. 1980)).

The Court stated that public figures and officials must show that defamatory statements were made with knowledge of their falsity or with reckless disregard of the truth. *Id.* at 2707. Alternatively, statements involving private individuals on matters of public concern place the burden on the plaintiff to show that the false connotations were made with some level of fault as required by *Gertz. Id.* Thus, on matters of public concern, statements must be provable as false before liability can be imposed under state defamation laws, at least when they involve a media defendant. *Id.* (citing *Hepps,* 475 U.S. at 772).

Turning to the facts of the instant case, the Court found that the language used in the article about Milkovich was not "loose, figurative or hyperbolic language." *Id.* Additionally, the Court stated that neither the language, nor the general tenor of the article, negated the impression that the author seriously maintained that Milkovich committed the crime of perjury. *Id.*

The Court noted that the truth could be ascertained by comparing, inter alia, Milkovich's testimony at the OHSAA hearing with his subsequent testimony in trial court. Therefore, the connotation that Milkovich committed perjury was an articulation of an objectively verifiable event. *Id.* Consequently, the Court remanded the case for a determination of whether or not the statements were false.

In reaching its conclusion, the Supreme Court managed to intricately balance first amendment values. Namely, it balanced the vital guarantee of freedom of speech as it relates to the press and the uninhibited discussion of public issues against the pervasively strong interest of preventing reputations from being falsely dishonored. Thus, the Court, in a unanimous decision, opted not to provide even more protection to media defendants by failing to recognize an opinion exception to state defamation laws.

— *Kimberly A. Doyle*

Illinois v. Perkins: UNDERCOVER AGENTS NEED NOT GIVE *MIRANDA* WARNINGS TO INCARCERATED SUSPECTS BEFORE ASKING QUESTIONS WHICH MAY ELICIT INCRIMINATING RESPONSES

In *Illinois v. Perkins,* 110 S. Ct. 2394 (1990), the Supreme Court held that the fifth amendment does not require undercover government agents posing as inmates to give *Miranda* warnings to incarcerated suspects before asking questions that may elicit incriminating responses. The Court found that no coercive atmosphere exists when an incarcerated suspect voluntarily makes incriminating statements to an officer he assumes to be a fellow inmate.