Demystifying the Law on Opinion and Embracing *Milkovich*

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At a recent media law conference, a lawyer lamented: "Whenever I hear a court mention *Milkovich v. Lorain Journal Co.*,[1] I want to cry. Please, just give me back the clarity of *Ollman v. Evans*[2] and its four factors."[3]

It is a common refrain, but is unwarranted. The Supreme Court's 1990 decision in *Milkovich* does not deserve the scarlet letter it has received from the defense bar.

Yes, it triggered a wave of tsunami warnings among libel defense lawyers and First Amendment scholars, who worried the decision represented a doctrinal shift that would dismiss lower courts' longstanding view of *Gertz v. Robert Welch, Inc.*[4] as creating an absolute constitutional privilege for any and all expression of opinion. And, yes, the plaintiff's bar enthusiastically viewed it as a spear to pierce protections for opinion.

But here's the reality: there was no tectonic shift, and *Milkovich* weakened no fundamental constitutional protections. And, as a spear, it has a very limited application. *Milkovich* was a highly factual decision that turned on application of prior law to the very particular context of an opinion column. Despite the hue and cry that has followed over the last quarter century, the Supreme Court did not fundamentally change the law. While the Supreme Court did not adopt the specific test from *Ollman* as the law of the land, it still recognized that the "dispositive question" *Ollman* sought to answer – *whether the reasonable reader would understand a statement to imply an assertion of a defamatory fact or knowledge of undisclosed defamatory facts about the plaintiff* – was the correct inquiry. The Supreme Court's analysis embraced the *Ollman* factors as relevant to answering this question.[5]

Ultimately, *Milkovich* represents an affirmation of First Amendment principles of general applicability, and the only disagreement between the majority and the dissent was not on the various constitutional protections and rules, but rather on the application of the law to determine when a statement of opinion implies an assertion of a defamatory fact. Although it has created more than its share of confusion, it is a case that the libel defense bar should not disdain, ignore or try to explain away. Rather, it is one the defense bar should enthusiastically embrace – defense lawyers should own it and use it to their own advantage. Viewed correctly, for defendants, there is more to love in *Milkovich* than to disparage.

The Supreme Court's 1990 decision in *Milkovich* does not deserve the scarlet letter it has received from the defense bar.

Justice Brennan's dissent in *Milkovich*[6] is particularly helpful in this regard: as a prism for viewing the majority decision, for its affirmation of First Amendment principles. Moreover, the majority opinion is particularly helpful for the light it shines on *Philadelphia Newspapers, Inc. v. Hepps*[7] and *Bose Corp. v. Consumers Union of United States, Inc.*[8]

Indeed, it may be that the most valuable aspect of *Milkovich* for the media bar has been largely overlooked. In cases in which the speech involved matters of public concern, the *Milkovich* majority opinion can provide helpful guidance regarding the quantum and quality of evidence that is needed for a court to apply the constitutional requirements set forth in *Hepps and Bose*.[9] Specifically, it provides guidance that suggests the plaintiff's burden is higher than a mere preponderance of the evidence.

Since *Milkovich* was decided, a large body of relevant state and federal appellate cases has accumulated and, most often, the decisions have hewed closely to the established First Amendment principles.[10] Moreover, in its own decisions touching on fact and opinion since *Milkovich*, the Supreme Court has also provided significant new support and clarification of the law – and the critical role of context in applying it.

Perhaps no single post-*Milkovich* opinion better illustrates the Supreme Court's continued support for pure opinions than *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*,[11] decided unanimously just last year. Ironically, *Omnicare* was not a libel case. It never mentioned *Milkovich,* and it drew only modest attention from First Amendment lawyers when the decision was announced. But the opinion's expansive treatment of fact and opinion actually have much to offer in defamation defense matters.

Milkovich: A Synopsis

Milkovich's news-making moment was primarily its holding that no separate constitutional protection for statements of opinion exists, as a statement of opinion can be actionable if it implies knowledge of

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undisclosed defamatory facts.

Milkovich centered on a newspaper sports columnist's piece about an altercation at a Maple Heights, Ohio high school wrestling match at which several people were injured.[12] The wrestling coach, Michael Milkovich, and the local school superintendent, H. Donald Scott, first testified at an Ohio state high school athletic association (OHSAA) hearing that resulted in probation for the school and censure for Milkovich for his actions during the altercation.[13] Parents and wrestlers later sued to overturn the probation. Milkovich and Scott testified at that hearing as well, and the trial court overturned the association's ruling on due process grounds.[14]

The next day, the newspaper published a story by Theodore Diadiun entitled "Maple beat the law with the 'big lie.'" The article made the following statements about Milkovich:

- "A lesson was learned (or relearned) yesterday by the student body of Maple Heights High School . . . It is simply this: If you get in a jam, lie your way out."
- "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 head 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."[15]

Milkovich sued for libel, alleging that the statements accused him of committing the crime of perjury. The trial court granted summary judgment to the newspaper on grounds that the statements were protected opinion. After a long and winding road, the U.S. Supreme Court granted certiorari "to consider the important questions raised by the Ohio courts' recognition of a constitutionally required 'opinion' exception to the application of its defamation laws."[16] The Supreme Court reversed, declining to embrace a constitutionally mandated opinion exception to the application of state libel laws.[17] Explaining that there are limits to the First Amendment protections for wholly private persons and that anything that could be labeled as a statement of opinion was not automatically protected, the Supreme Court stated: "we think the 'breathing space' which 'freedoms of expression require in order to survive,' is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact."[18]

After a long and winding road, the U.S. Supreme Court granted certiorari "to consider the important questions raised by the Ohio courts' recognition of a constitutionally required 'opinion' exception to the application of its defamation laws."

While both the majority and dissent agreed the Diadiun column was the author's opinion, they disagreed about whether a reasonable reader would have thought the columnist implied knowledge of additional undisclosed defamatory facts. It is in the examination of Diadiun's "knows in his heart" paragraph that Justice Brennan and the majority definitively parted ways. Justice Brennan's view was that, based on the cautionary language used and its format as a signed editorial column, "[n]o reasonable reader could understand Diadiun to be impliedly asserting – as fact – that Milkovich had perjured himself."[19]

Justice Brennan writes, "the tone and format of the piece notify readers to expect speculation and personal judgment. The tone is pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage. Diadiun never says, for instance, that Milkovich committed perjury. He says that '[a]nyone who attended the meet . . . knows in his heart' that Milkovich lied – *obvious hyperbole*, as Diadiun does not purport to have researched what everyone who attended the meet knows in his heart."[20]

The majority, meanwhile, examined the same statement and reasoned that "[t]his is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor, does the general tenor of the article negate this impression."[21]

Is It All About *Hepps* and the Burden of Proof?

It is interesting (and, for the media bar, helpful) to note that the Supreme Court in *Milkovich* did not allow the plaintiff's denial of the perjury charge alone to be sufficient to create a jury issue on the question of falsity. In its application of the *Hepps* requirement that the plaintiff bears the burden of proving falsity, the Supreme Court found that the implication that Milkovich had committed perjury had to be proven false by a "core of objective evidence."[22] Specifically, the Supreme Court found:

> We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, inter alia, petitioner's testimony before the OHSAA board with his subsequent testimony before the trial court. As the *Scott* court noted regarding the plaintiff in that case: "Whether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced

> from the transcripts and witnesses present at the hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." So too with petitioner Milkovich.[23]

The *Hepps* decision is vague about how a trial court would apply the requirement that the plaintiff must bear the burden of proving falsity "conclusively" when the speech relates to a matter of public concern.[24] In *Hepps*, there is no discussion of a "core of objective evidence."

Milkovich is more emphatic. Whether intended or not, by seizing on the *Hepps* requirement that the Plaintiff had the burden of proving falsity, the *Milkovich* majority appeared to require a heightened burden of proof: that in cases of public concern, unless the objective evidence is "conclusive," the burden of proof is "dispositive."

It seems clear that the guidance from *Milkovich* is that for Milkovich to prevail, he had to be able to point to some other unambiguous and objective evidence that is more clear and convincing than just the subjective denials he and the superintendent issued. And that is what *Hepps* did require. As the Supreme Court explained:

> There will always be instances when the fact-finding process will be unable to resolve **conclusively** whether the speech is true or false; it is in those cases that the burden of proof is dispositive … Because the burden of proof is the deciding factor only when the evidence is **ambiguous**, we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false.[25]

Indeed, shortly after the Supreme Court decided *Milkovich*, the United States Court of Appeals for the Ninth Circuit applied the *Hepps* standard in *Unelko Corp. v. Rooney*.[26] In *Unelko*, the manufacturer of Rain-X sued Andy Rooney for saying on 60 Minutes that Rain-X "didn't work." The Circuit Court found that the Rooney statement could be read to imply an assertion of an objective defamatory statement. Nonetheless, the court upheld the grant of summary judgment for Rooney because the manufacturer could not demonstrate that Rooney's statement was false in substance. The evidence was ambiguous at best, and under *Hepps* this required a finding in favor of Rooney. Although *Unelko* was decided only months after *Milkovich*, few courts since have undertaken a similar analysis.[27]

The Supreme Court also discussed the adoption of a "fair comment" defense to help ensure that the defamation laws do not unduly stifle "valuable public debate."

Of course, *Milkovich* does not specify the quantity and quality of evidence necessary to determine whether an allegedly defamatory statement can be verified as true or false. Clearly, a plaintiff's subjective assertion is not enough. On the other hand, where a "core of objective evidence" can answer the question, as in *Milkovich*, then that will dispose of the issue. However, could there be other ways to meet the burden? Could testimony by witnesses rise to the level of proving something as true or false in this context? How many witnesses would be necessary? Do they have to be unbiased? Would allowing subjective evidence, however strong, run afoul of the requirement in *Hepps* that the issue must be conclusively proven to be true or false? If this situation arises, it may ultimately have to be resolved by the Supreme Court.[28]

The Majority's Emphasis On Existing Protections Afforded To Opinions

Chief Justice Rehnquist, who authored the majority opinion, began his 23-page majority opinion by briefly summarizing the facts and the fifteen years of litigation history in the case, including a holding that Milkovich was not a public figure. He emphasized the need to protect private individuals when an expression of opinion implies an assertion of an objective defamatory fact and cited the importance of reputation:

> Who steals my purse steals trash;
> 'Tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.[29]

The Supreme Court also discussed the adoption of a "fair comment" defense to help ensure that the defamation laws do not unduly stifle "valuable public debate." As the Court explained:

> The principle of "fair comment" afforded legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact. According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion. Thus under the common law, the privilege of "fair comment" was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech.[30]

Dismissing the idea that all "ideas" or opinions should be immune from *any* liability, the Supreme Court launched into a famous short-form example of why all opinions do not deserve to be exempted from common law rules of defamation intended to protect the reputations of private

men: "In my opinion, John Jones is a liar." [31] Chief Justice Rehnquist stressed that such a statement can still harm a man's reputation as it implies knowledge of additional facts which caused the speaker to come to the conclusion that Jones lied:

> Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." . . . 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."[32]

Chief Justice Rehnquist also emphasized that even in situations of pure opinion (in which the speaker states the facts upon which he bases his opinion) those statements may still imply a false assertion of fact if the facts are incorrect or incomplete.[33]

The Supreme Court then emphasized the existing protections the Court had enacted as part of a "constitutional evolution."[34] Over the course of six pages, the Supreme Court reaffirmed numerous important constitutional protections it found must be afforded to all speech: the abolishment of strict liability,[35] heightened culpability requirements for public figures and officials,[36] requiring the plaintiff to prove falsity if the statement involves a matter of public concern,[37] protections for certain *types* of speech[38] (such as rhetorical hyperbole, imaginative expression, and speech that could not be reasonably be interpreted as stating actual facts about the individual),[39] and constitutionally required *de novo* review of the entire appellate record in defamation cases.[40] Emphasizing the importance of each rule, Chief Justice Rehnquist also emphasized the struggle between giving "breathing room" for important political discourse and the need to protect private individuals. After listing these important existing constitutional protections, the Supreme Court found that they were sufficient:

> We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment.[41]

And the Court further found that:

> The dispositive question in the present case then becomes whether or not a reasonable fact finder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative.[42]

By protecting "pure opinions" that do not imply additional defamatory facts, the Supreme Court in *Milkovich* reasserted its commitment to ensuring that debate on public issues must remain "uninhibited, robust, and wide-open . . ."

Ultimately, *Milkovich* establishes a "dispositive question" which is almost identical to the test set forth in Section 566 of the Restatement (Second) of Torts. According to the Restatement, "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable *only if* it implies the allegation of undisclosed defamatory facts as the basis for the opinion."[43]

Without question, *Milkovich* provides great value in libel defense work for its explanation and embrace of established constitutional protections. Both the majority opinion and the dissent, at length, emphasized the general tests that protect all speech – facts and opinions. For the media bar, there is much to appreciate and draw on in these re-affirmations.

The Majority Got It Right

Meanwhile, regarding the particulars of the case at hand – *hold on to your hats* – it's reasonable to conclude the majority got it right. And that's okay, even for the media bar.

The problem with Justice Brennan's view is the sports writer goes too far when he says anyone there, even an unbiased observer, "knows in his heart" that Milkovich and Scott lied at that hearing. By invoking the support of the "unbiased observer," the columnist does seem to imply knowledge with a strong degree of certainty that both the superintendent and coach were guilty of perjury. It is highly questionable that Justice Brennan's assertion that Diadiun's "knows in his heart" statement was obvious hyperbole. Diadiun's assertion takes on a powerful connotation that there is no ambiguity as to what was observed at the meet and that any witness would know Milkovich and Scott had lied under oath. To the reader, it certainly "could" imply that Diadiun had additional personal knowledge of an unambiguous event. The column noted, in fact, that he had been the only uninvolved person at both the controversial meet and the administrative hearing, a fact that could have suggested to readers that he was uniquely situated with personal knowledge of additional facts that are not disclosed to the reader. Moreover, Diadiun did not offer a response from Milkovich, but instead quoted a commissioner who said that what the pair had said before the judge "sounded different" than what they had said to the board.

While the majority opinion does not say what additional knowledge was inferred, the article is clearly not "full and complete" with the facts. If it had been, it may have been "a different case," as was true with *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*.[44] In the end, Diadiun seemed to have implied to a

reasonable reader of his sports column that he knew more details than he reported, and the threat to reputation was made all the more dangerous because Diadiun also invoked the impression that what he knew was so clear and unambiguous that his perspective was the *only* perspective and was based upon additional facts (including additional details from his personal observations at the meet, the board hearing and his conversation with the commissioner) that he did not disclose.

When a reader is implicitly "invited to draw their own conclusions from the mixed information provided," then the statements are constitutionally protected as "pure opinions."[45] By contrast, in *Milkovich*, the readers were told implicitly that Diadiun had additional personal knowledge that formed the basis for his opinions and he basically insists that those facts were not ambiguous and that "only one conclusion was possible."

This is a crucial distinction, and it makes it clear why *Milkovich* is limited to its specific facts.

Verifiability Alone Is Not Sufficient To Ascertain If A Statement Is An Opinion

Contrary to myth perpetuated by some courts and commentators, *Milkovich* does not stand for the proposition that anything that can be proven false by objective evidence is necessarily a fact and thus actionable. As Bruce Sanford notes in *Libel and Privacy*, §5.1, this restricted view "could endanger the essential exchange of opinion in a free society."[46] Sanford used the example of the many expressions after the O.J. Simpson murder trial stating that O.J. Simpson was guilty, notwithstanding the jury's verdict finding him innocent. Clearly, Sanford explained, a test that protects only non-factual opinions would chill core political speech, *e.g.*, commentary on perceived shortcomings of the criminal justice system. Factual assertions like those that followed the O.J. Simpson or Casey Anthony trial are "protected because social context provides the clue that they are individual opinion, and because they are based on widely known and disclosed facts."[47]

By protecting "pure opinions" that do not imply additional defamatory facts, the Supreme Court in *Milkovich* reasserted its commitment to ensuring that debate on public issues must remain "uninhibited, robust, and wide-open,"[48] while acknowledging the countervailing concern that due weight be given to society's "pervasive and strong interest in preventing and redressing attacks upon reputation."[49]

Thus, verifiability is not the only way to determine if a statement is a fact or opinion. Significantly, the Supreme Court in *Milkovich* never says that all statements that are "verifiable" are indeed facts. Nor did the Court say that any time someone is called a liar it is a factual charge of perjury. If they had, then they would have gutted the defense of "pure opinion," and it is clear that the Court did not do that.[50]

Certainly, there is (and should be) public debate over criminal charges or potential wrongdoing – even lying and perjury – where the outsider could never know on the basis of any objective evidence the truth or falsity of what occurred. If the only evidence available to prove the charges had been subjective and ambiguous, *Milkovich* may well have been decided in the plaintiff's favor. In other words, *Milkovich* presented a unique set of facts, and it certainly does not foreclose constitutional protection for pure opinion and/or speculation that is crucial to public discourse. As Justice Brennan eloquently explained, "pure opinions," which commonly come in the form of speculations and accusations, must be and remain protected after *Milkovich:*

> The public and press regularly examine the activities of those who affect our lives. One of the prerogatives of American citizenship is the right to criticize men and measures. 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.[51]

Lessons From Omnicare And The Importance Of Context

The recent Supreme Court decision in *Omnicare*,[52] is instructive on both the question of verifiability and how to assess the difference between a fact and an opinion. In that 2015 decision, Justice Kagan, writing for the majority, never mentions *Milkovich*, and it is important to note that it was a securities case, not a libel case. But it provides a substantial benefit to the First Amendment arena by clarifying the role of context in determining whether an opinion is actionable for its implication of additional false facts. In *Omnicare*, the Court specifically found that a statement of opinion or belief about whether conduct is in compliance with the law, even if a plaintiff could later be proven wrong, is not a false statement of fact.[53] Thus, out of the gate it is clear that even if a statement is verifiable, it can still be a protected statement of opinion.

Omnicare involved a dispute between a pharmacy services company, Omnicare, and a pension fund regarding this potentially actionable opinion statement: "We believe our contractual arrangements" with pharmaceuticals suppliers and healthcare providers "complied with state and federal laws."[54] Omnicare made this statement in connection with a stock offering. Subsequently, the federal government filed suit, alleging that Omnicare received illegal kickbacks from pharmaceutical manufacturers.[55]

Investors, led by pension funds, sued Omnicare under a securities law provision that authorizes litigation over any statements containing "an untrue statement of material fact" or omission of a material fact.

The funds maintained, and the United States Court of Appeals for the Sixth Circuit agreed, that a "statement that 'we believe we are following the law' conveys that 'we in fact are following the law'—which is 'materially false,' no matter what the issuer

thinks, if instead it is violating an anti-kickback statute."[56] This substantially blurred the line between opinion and fact, creating an opportunity for the Supreme Court to draw clearer lines.

The Supreme Court determined that the Sixth Circuit had conflated facts and opinion and, in vacating the Sixth Circuit's decision, held that an "opinion is not misleading just because external facts show the opinion to be incorrect."[57] The Supreme Court used the example of a cup of coffee: "[A] statement of fact ('the coffee is hot') expresses certainty about a thing, whereas a statement of opinion ('I think the coffee is hot') does not."[58] Yet, there also may be an affirmative requirement of a good faith belief in the truth of a statement because "every [opinion] statement explicitly affirms one fact: that the speaker actually holds the stated belief."[59]

As in *Milkovich*, the Supreme Court affirmed that opinion statements are not wholly immune from liability, but reaffirmed that the exceptions to immunity are narrow and entirely driven by context.

Some opinion statements can give rise to false-statement liability if they contain embedded statements of untrue facts, but this is not true with every opinion statement and will vary by context. In *Omnicare*, the statements were pure opinion statements because they contained no implied false facts.

In other words, if the speaker does not state or imply that he or she is in possession of objectively verifiable facts, a reasonable reader should understand "that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise," and "the statement is not actionable."[60] This form of opinion, under *Omnicare*, *Milkovich*, and pre-*Milkovich* jurisprudence, where the facts are fully set forth and the reader is able to draw their own conclusions about the validity of that opinion, is entitled to the fullest First Amendment protection.

In *Omnicare,* the Supreme Court also examines "whether an omission makes an expression of opinion misleading," and potentially actionable, and concludes that it "*always depends on context*."[61] Context, according to the Court, is a function of both the nature of the publication containing the opinion statement, and the expectations that the likely audience for such documents has when reviewing them.

Thus, who is speaking, who is listening or reading and the nature of the communications forum are all critical in the calculus of assessing opinion speech. By logical extension, whether a statement is one of opinion or fact can turn upon the reasonable reader's expectation of the speakers and their expertise (or lack thereof). Indeed, in *Omnicare*, the Supreme Court applied this concept not just to different readers but also to different speakers, noting the readers may be more likely to infer additional facts as forming the basis of opinions offered by "experts," whereas they would not do so if the speaker was just an average person who could be said to be just pontificating or giving "baseless, off-the-cuff judgments" one is akin to hear in daily life.[62]

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As the Supreme Court explained, whether the speaker is someone who "holds himself out or is understood as having special knowledge of the matter which is not available to the plaintiff" is relevant to the inquiry of whether a speaker might be understood as implying additional defamatory facts as the basis for the opinion.[63]

So, in short, *Ollman* is not dead – and its suggestions on how to assess the impact of a statement on a reasonable reader are still instructive. The key is to be fully mindful of context – what is said, the nature of the speaker, the reader's expectations of the publication or medium of speech, the verifiability of the statements at issue – and to recognize that no one factor is dispositive.

As one dear colleague exclaimed – "so, are you saying *Milkovich* is limited to its facts?" Yes. It is and it has to be. The Supreme Court defines the "dispositive question" as requiring ascertainment of whether a reasonable reader would understand the publication to imply that the author was relying on undisclosed defamatory facts as the basis for the author's opinions. Application of this test inherently requires a fact-driven contextual analysis which will almost certainly vary from publication to publication. As the prior case of *Greenbelt* (which is discussed extensively by the majority) and the subsequent case of *Omnicare* illustrate, the issue of whether a statement expresses or implies defamatory facts always depends on the context and the impact of the statement on the reasonable reader.[64]

Indeed, courts have also found that statements made as part of an emotional, heated, or adversarial debate often negate the impression that the publisher was asserting an objective fact. Similarly, in the routinely vitriolic world of online forums, readers bring a very different set of expectations to the discourse they encounter.

Some scholars have suggested that Chief Justice Rehnquist's opinion in *Milkovich* gave short shrift to the importance of context. Justice Brennan's dissent counters that view, of course. Yet, even more notable is that the majority opinion incorporated the whole text of the column at issue in a footnote, which prompts the question: Would the Supreme Court have reprinted the entire publication if they were ignoring context? The majority also explained:

> The clear impact in some nine sentences and a caption is that Milkovich lied at the hearing after having given his solemn oath to tell the truth. This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.[65]

Upholding The Balance

Critics charge *Milkovich* with "supplant[ing] the *Ollman* test," making the law "murky" or even as being wrongly decided. Yet, a close reading of the opinion shows that the Supreme Court did not "truly change the landscape" but was "merely emphasiz[ing] specific issues in the dispute before the Court at the time."[66] As well-regarded libel scholar Bruce Sanford explained:

> Whatever the Court intended to do in Milkovich, many courts have shown great reluctance to abandon prior law. As one court explained, although Milkovich declined to engraft a new arm of libel law onto the established framework of constitutional privileges and protections, those safeguards "are considerably broader than might be imagined from a reading of popular reports of the opinion privilege's demise." Courts often reach this conclusion in one of three ways-by reasoning that Milkovich did not truly change the landscape, by adding "context" to the mix despite *Milkovich*'s apparent omission, or by finding protection for opinion in state constitution.[67]

Much has been written about this "great reluctance to abandon prior law."[68]

But viewed through the prism of Justice Brennan's dissent and post-*Milkovich* jurisprudence, it seems just as clear that lower courts were never encouraged to abandon prior law. As Justice Brennan suggests, the *Milkovich* case simply further defined the contours of opinion protection and its relationship "to other doctrines within our First Amendment jurisprudence."[69]

In the dissent, Justices Brennan and Marshall agreed generally on the First Amendment principles at stake, but diverged in their application of those principles to the specific facts presented in *Milkovich*. This clear agreement between majority and dissent on the governing legal principles proves the true nature of the *Milkovich* holding: the court did not undermine any existing First Amendment protections. Rather, it simply refused to adopt the mistaken assumption that a separate opinion privilege existed independent of general First Amendment protections for all speech.

Indeed, courts have also found that statements made as part of an emotional, heated, or adversarial debate often negate the impression that the publisher was asserting an objective fact.

And finally, in its application of *Hepps*, the Supreme Court in *Milkovich* has given back to First Amendment protections at least as much as some critics of the decision think it took away. In effect, drawing from both *Bose* and from *Harte-Hanks*, it not only appears to say the standard of proof required to prove falsity is a higher bar than a mere preponderance of the evidence, but it also gives some guidance as to the quantum and quality of evidence necessary to apply the "constitutional requirement" of *Hepps*.[70] Although precisely what evidence is sufficient remains unclear, it is clear that the Supreme Court requires a "core of objective evidence" and not just a plaintiff's subjective assertions.[71] In its application of this test, the majority also made clear that the inquiry into of whether a statement can be proven false must be made on a "case-by-case basis" to ensure there is no "forbidden intrusion on the field of free expression."[72]

Ever wary that "whatever is added to the field of libel is taken from the field of free debate," the Supreme Court in *Milkovich* sought to uphold the balance between these two fields.[73] Because the Court did not fully articulate its reasoning, it is debatable whether the decision added or subtracted from either field. Most likely, the Court in striking its balance, recognized that inherent in *Hepps* is the requirement that for a plaintiff to meet the requisite burden of proof on falsity, the evidence cannot be ambiguous. Although far from affording immunity to any statement of opinion, the Court did give insight into the First Amendment protections that encourage the open exchange of ideas on matter of public concern and made clear that the bar that must be reached to punish opinions is quite high.

Endnotes

1. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).
2. *Ollman v. Evans,* 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).
3. *Id.* at 979 (to evaluate the totality of the circumstances of an allegedly defamatory statement, four factors are considered in assessing whether the average reader would view the statement as fact, or conversely, opinion: (1) the common usage or meaning of the specific language of the challenged statement; (2) the statement's verifiability; (3) the general and full context of the statement; and (4) the broader context or setting in which the statement appears).
4. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974).
5. *See* Bruce Sanford, *Libel and Privacy*, § 5.1 (Supp. 1997); *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.*, 879 P.2d 6, 10 (Colo. 1994) ("the majority's reasoning and analysis in *Milkovich* strongly support the conclusion that the factors identified in [*Ollman*] remain applicable under *Milkovich*"), *cert. denied*, 514 U.S. 1015 (1995).
6. *See Milkovich*, 497 U.S. at 23 – 36 (Brennan & Marshall, JJ., dissenting in part) ("[s]ince this Court first hinted that the First Amendment provides some manner of protection for statements of opinion, notwithstanding any common-law protection, courts and commentators have struggled with the contours of this protection and its relationship to other doctrines within our First Amendment jurisprudence. Today, for the first time, the Court addresses this question directly and, to my mind, does so cogently and almost entirely correctly. I agree with the Court that under our line of cases

culminating in *Philadelphia Newspapers, Inc. v. Hepps*, only defamatory statements that are capable of being proved false are subject to liability under state libel law. I also agree with the Court that the 'statement' that the plaintiff must prove false under *Hepps* is not invariably the literal phrase published but rather what a reasonable reader would have understood the author to have said.") (citations omitted).

7. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *see Milkovich*, 497 U.S. at 16 ("[T]he Court [in *Hepps*] fashioned 'a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.' Although recognizing that 'requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so,' the Court believed that this result was justified on the grounds that 'placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result.'").

8. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984); *see Milkovich*, 497 U.S. at 21 (recognizing that the "enhanced appellate review required by *Bose Corp.* provides assurance that the foregoing determinations will be made in a manner so as not to "constitute a forbidden intrusion on the field of free expression.").

9. In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989), the Supreme Court further explained:

[O]nly through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards. Moreover, such elucidation is particularly important in the area of free speech for precisely the same reason that the actual malice standard is itself necessary. Uncertainty as to the scope of the constitutional protection can only dissuade protected speech – the more elusive the standard, the less protection it affords. Most fundamentally, the rule is premised on the recognition that "[j]udges, as expositors of the Constitution," have a duty to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'"

10. Len Niehoff & Ashley Messenger, *Milkovich v. Lorain Journal Twenty-Five Years Later: The Slow, Quiet, and Troubled Demise of Liar Libel*, 49 U. Mich. J. L. Reform 467 (2016), available at: http://repository.law.umich.edu/mjlr/vol49/iss2/4.

11. *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund,* 135 S. Ct. 1318 (2015).

12. *See Milkovich*, 497 U.S. at 3-4.

13. *Id*. at 4.

14. *Id*.

15. *Id*. at 4-5.

16. *Id*. at 10.

17. *Id*. at 21 (majority opinion).

18. *Id*. at 19 (citing *Hepps*, 475 U.S. at 772) (majority opinion).

19. *See Id*. at 30 (Brennan & Marshall, JJ., dissenting in part).

20. *Id*. at 32 (Brennan & Marshall, JJ., dissenting in part) (emphasis added).

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21. *See Id*. at 21 (majority opinion).

22. *Id*. at 21 (majority opinion).

23. *Id*.

24. *See Hepps*, 475 U.S. at 776-77.

25. *Id.*

26. *Unelko v. Rooney,* 912 F.2d 1049 (9th Cir. 1990).

27. *See Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990); *see also Cochran v. NYP Holdings, Inc.*, 58 F.Supp. 2d 1113 (C.D.Cal. 1998) (granting motion to dismiss defamation claim by Johnnie Cochran where court found article criticizing Cochran's tactics in the O.J. Simpson trial to be opinions where no core of objective evidence could verify the allegations). A Montana case discusses *Cochran* and its reliance on a "core of objective evidence," but the court does not apply the test explicitly. *Knievel v. ESPN, Inc.*, 223 F. Supp.2d 1173 (D.Mont. 2002) (granting motion to dismiss defamation claim where court found that caption under photograph of Evel Knievel and his wife in context could not be interpreted by a reasonable person of accusing Evel Knievel of being a pimp in the criminal sense or implying Krystal Knievel of being a prostitute).

28. *See Bose*, 466 U.S. at 499 (where First Amendment issues are raised, an appellate court must examine the whole record to protect against "a forbidden intrusion on the field of free expression").

29. *Milkovich*, 497 U.S. at 12 (majority opinion) (quoting Shakespeare's Othello, Act III, scene 3).

30. *Id*. at 13-14 (citations omitted).

31. *Id*. at 18-20.

32. *Id*. at 19 (citations omitted). Of course, unlike the Court's hypothetical, the words "in my opinion" do not appear in *Milkovich*'s Diadiun column. Thus, this appears to be the majority's rebuttal to the dissent's reliance upon the cautionary language of "apparently" and why such a phrase is not dispositive to the question of whether an opinion implies defamatory fact. Of course, as two prominent media law scholars recently noted: "This is not to say that phrases like 'in my opinion' or 'I believe' are without significance. To the contrary, in certain contexts they can provide important clarity regarding the certainty with which speaker purports to be speaking." Len Niehoff & Ashley Messenger, *Milkovich v. Lorain Journal Twenty-Five Years Later: The Slow, Quiet, and Troubled Demise of Liar Libel*, 49 U. Mich. J. L. Reform 467, 473 (2016).

33. *Milkovich*, 497 U.S. at 19 (majority opinion).

34. *Id*. at 14-17, 19-21, 23-24.

35. *Gertz*, 418 U.S. at 347-48.

36. *Id*. at 342-343 (holding that public officials and public figures that have "voluntarily exposed themselves" to increased risk of reputational injury cannot prevail on defamation claims unless they can show – by clear and convincing evidence – that the defendant knew his statements were false or in fact entertained serious doubts as to their truth); *see also New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

37. *See Hepps*, 475 U.S. at 776-78 (fashioning a constitutional requirement that a defamation plaintiff must bear the burden of showing falsity when the speech at issue relates to a matter of public concern).

38. *See Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 13-14 (1970) (holding a plaintiff cannot cherry pick words out of context and because context is vital in every case, and will vary, so will the holdings of cases).

39. *Id*. at 13-14; *see also Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

40. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

41. *Milkovich*, 497 U.S. at 21 (majority opinion).

42. *Id*.

43. Restatement (Second) of Torts §

566 cmt. c (Am. Law Inst. 1977) ("[a] simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is"); *see also Mathias v. Carpenter*, 587 A.2d 1, 4 (Pa.Super. 2010) ("[t]he reasonable reader, having access to the facts on which the comparison was based, [can] decide for himself or herself whether the facts support the writer's comparison. The reader, therefore, [is] provided with adequate facts to access the validity of the opinion expressed.").

44. *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler,* 398 U.S. 6 (1970).

45. *See Phantom Touring, Inc. v. Affiliated Publ'ns.*, 953 F.2d 724, 730-31 (1st Cir. 1992).

46. *See* Bruce Sanford, *Libel and Privacy*, § 5.1 (Supp. 1997).

47. *Id*.

48. *Milkovich*, 497 U.S. at 20 (quoting *New York Times Co.*, 376 U.S. at 270).

49. *Milkovich*, 497 U.S. at 21 (quoting *Rosenblatt v. Baer*, 383 U.S. 75 (1966)).

50. The Supreme Court recently reaffirmed the protections afforded to pure opinion in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indust. Pension Fund*, 135 S.Ct. 1318 (2015) (holding in a Securities Act case that statements regarding belief in whether a company complied with the law were "pure statements of opinion" and not statements of objective fact).

51. *Milkovich*, 497 U.S. at 34-35 (Brennan & Marshall, JJ., dissenting in part) (citations omitted).

52. *Omnicare,* 135 S.Ct. at 1327 (majority opinion).

53. *Id*.

54. *Id*. at 1323.

55. *Id*. at 1324.

56. *Id*. at 1325.

57. *Id*. at 1328.

58. *Id*.

59. *Id*. at 1326. Justice Kagan's *Omnicare* majority does not say anything about a core of objective evidence but does emphasize that a statement of fact expresses certainty, as compared to an "inherently subjective and uncertain assessment[]" in a statement of pure opinion. *Id.* at 1327. Interestingly, Scalia notes in his concurring opinion that at common law there was standard for an expert having a "reasonable basis" for his statements — in other words, requiring a "reasonable investigation":

> If the speaker subjectively believes he lacks a reasonable basis, then his statement is simply a knowing misrepresentation. If he does not know of the ambiguity, or knows of it, but does not intend to deceive, he is not liable. That his basis for belief was 'objectively unreasonable' does not impart liability, so long as the belief was genuine.

Id. at 1336. Scalia goes on to state that the "objective test" to determine immunity from liability proposed by the Court in *Omnicare* is inconsistent with this common law analysis by inviting "roundabout attacks upon expressions of opinion." Scalia explains that:

> [l]itigants seeking recompense for a corporation's expression of belief that turned out, after the fact, to be incorrect can always charge that even though the belief rested upon an investigation the corporation thought to be adequate, the investigation was not "objectively adequate."

Id. at 1336-37.

60. *Cochran v. NYP Holdings, Inc.*, 58 F.Supp. 2d 1113, 1122 (C.D.Cal. 1998).

61. *Omnicare*, 135 S.Ct. at 1330 (majority opinion).

62. *Id.* at 1327-30.

63. *Compare Omnicare*, 135 S.Ct. at 1330 (distinguishing the heightened expectations reasonable readers would have about an opinion in a formal registration statement filed with the SEC from the expectations an individual might have for communications in "daily life," *i.e*., "baseless, off-the-cuff-judgments"), *and Mathis v. Cannon,* 276 Ga. 16, 24 (2002) ("Although the messages "accused [plaintiff] of being a crook and a thief . . . . any person reading the postings on the message board – written entirely in lower case replete with question marks, exclamation points, misspellings, abbreviations, and dashes – . . .[would know that defendant did not state] actual facts about Cannon"), and *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D. 3d 32, 43-44 (N.Y. App. Div. 2011) ("[T]he anonymity of the [publication] makes it more likely that a reasonable reader would view its assertions with some skepticism and tend to treat its contents as opinion rather than as fact."), *with Bennett v. Hendrix*, 325 F. App'x 727, 740-41 (11th Cir. 2009) (recognizing that the statement of the defendant, a law enforcement officer, that the plaintiff was a "convicted criminal" was libelous because reasonable readers could assume that the defendant, by nature of his position, had special knowledge about the plaintiff's criminal history), and *Weinstein v. Bullick*, 827 F. Supp. 1193, 1198 (E.D. Pa 1993) (holding that a police officer's expressions of skepticism concerning plaintiff's rape charges were not protected opinion because a reasonable viewer could infer that the officer knew more facts than were revealed in the broadcast).

64. *Omnicare*, 135 S.Ct. at 1330; *see also Air Wis. Airlines Corp. v. Hoeper*, 134 S.Ct. 852, 863 (2014) ("[T]he identity of the relevant reader or listener varies according to the context").

65. *Milkovich*, 497 U.S. at 21-22 (majority opinion).

66. Bruce Sanford, *Libel and Privacy*, § 5.1 (Supp. 1997) (citations omitted).

67. *Id.*

68. *Id*. *See also* Niehoff & Messenger, *supra* n. 11.

69. *Milkovich*, 497 U.S. at 23 (Brennan & Marshall, JJ., dissenting in part).

70. *Id.* at 16 (*citing Hepps*, 475 U.S. at 776-78).

71. *Id.* at 21.

72. *Milkovich*, 497 U.S. at 16 (*citing Bose*, 466 U.S. at 499).

73. *See New York Times*, 376 U.S. at 272.