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# Excerpts From Ruling On Opinion Privileges

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Following are excerpts from the Supreme Court's ruling today that the First Amendment does not automatically shield an expression of opinion from libel suits. Chief Justice William H. Rehnquist wrote the majority opinion. Justice William J. Brennan Jr. wrote a dissenting opinion for himself and Justice Thurgood Marshall.

FROM THE OPINION

Respondent J. Theodore Diadiun authored an article in an Ohio newspaper implying that petitioner Michael Milkovich, a local high school wrestling coach, lied under oath in a judicial proceeding about an incident involving petitioner and his team which occurred at a wrestling match. Petitioner sued Diadiun and the newspaper for libel, and the Ohio Court of Appeals affirmed a lower court entry of summary judgment against petitioner.

This judgment was based in part on the grounds that the article constituted an "opinion" protected from the reach of state defamation law by the First Amendment to the United States Constitution. We hold that the First Amendment does not prohibit the application of Ohio's libel laws to the alleged defamations contained in the article. . . .

The column contained the following passages:

"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.' . . .

"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." . . . Action Under Common Law Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. . . .

The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion. . . .

However, due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. . . .

In 1964, we decided in New York Times v. Sullivan that the First Amendment to the United States Constitution placed limits on the application of the state law of defamation. . . .

Still later, in Philadelphia Newspapers Inc. v. Hepps (1986), we held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." In other words, the Court fashioned "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." . . .

Dictum From 1974 Case

Respondents would have us recognize, in addition to the established safeguards discussed above, still another First Amendment-based protection for defamatory statements which are categorized as "opinion" as opposed to "fact." For this proposition they rely principally on the following dictum from our opinion in Gertz v. Robert Welch (1974):

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."

Judge Friendly appropriately observed that this passage "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question." Cianci v. New Times

Publishing Co., (CA 2 1980). Read in context, though, the fair meaning of the passage is to equate the word "opinion" in the second sentence with the word "idea" in the first sentence. . . .

Thus, we do not think this passage from Gertz was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." . . . Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

A False Assertion of Fact

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. 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." . . .

Apart from their reliance on the Gertz dictum, respondents do not really contend that a statement such as, "In my opinion John Jones is a liar," should be protected by a separate privilege for "opinion" under the First Amendment. But they do contend that in every defamation case the First Amendment mandates an inquiry into whether a statement is "opinion" or "fact," and that only the latter statements may be actionable.

They propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the Gertz dictum) be considered in deciding which is which. But we think the "breathing space" which "freedoms of expression require in order to survive," Hepps, (quoting New York Times), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and "fact."

Foremost, we think Hepps stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved.

Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. Hepps insures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection. ...

The Dispositive Question

We are not persuaded that in addition to these protections, an additional separate constitutional privilege for "opinion" is required to insure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadum column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. . . .

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.

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. . . .

We believe our decision in the present case holds the balance true. . . .

Reversed.

FROM THE DISSENT

Since 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 (1986), 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 reasonable reader would have understood the author to have said. . . .

In other words, while the Court today dispels any misimpression that there is a so-called opinion privilege wholly in addition to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dictated by existing First Amendment doctrine. As the Court explains, "full constitutional protection" extends to any statement relating to matters of public concern "that about an individual."

Among the circumstances to be scrutinized by a court in ascertaining whether a statement purports to state or imply "actual facts about an individual," as shown by the Court's analysis of the statements at issue here, are the same indicia that lower courts

have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made. . . .

Full Protection Required

With all of the above, I'am essentially in agreement. I part company with the Court at the point where it applies these general rules to the statements at issue in this case because I find that the challenged statements cannot reasonably be interpreted as either stating or implying defamatory facts about petitioner. Under the rule articulated in the majority opinion, therefore, the statements are due "full constitutional protection." I respectfully dissent.

I appreciate this Court's concern with redressing injuries to an individual's reputation. But as long as it is clear to the reader that he is being offered conjecture and not solid information, danger to reputation is one we have chosen to tolerate in pursuit of individual liberty and the common quest for truth and the vitality of society as a whole.

Readers are as capable of independently evaluating the merits of such speculative conclusions as they are of evaluating the merits of pure opprobrium. Punishing such conjecture protects reputation only at the cost of expunging a genuinely useful mechanism for public debate.

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