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Post-Milkovich Defamation: Is Everyone Still Entitled to Their Opinion?

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POST-*MILKOVICH* DEFAMATION: IS EVERYONE STILL ENTITLED TO THEIR OPINION?

Deeply rooted in the common-law doctrine of fair comment[1] is a qualified privilege against defamation actions[2] for expressions of opinion on matters of public concern.[3] This protection for opinions appeared to reach constitutional levels in the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*[4] While holding that private

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[1] *See* Note, *Torts—Defamation—Private Citizens Need Only Show Negligence in Defamation Actions Against Media Defendants: Does This Stifle the Media at the Public's Expense?*—Miami Herald Publishing Co. v. Ane, *458 So. 2d 239 (Fla. 1984)*, 13 FLA. ST. U.L. REV. 159, 160-61 (1985) ("Prior to 1964, the law of defamation was governed by the common law of the individual states."); Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 FORDHAM L. REV. 761, 763-64 (1990) ("fair comment privilege protected the defendant's right to discuss public affairs and the public's right to information on such issues"); Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 GEO. L.J. 1817, 1819-20 (1984) [hereinafter Note, *Fact-Opinion*] (fair comment privilege existed at common law).

[2] *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771-85 (5th ed. 1984). Defamation as a whole is defined as a communication

> which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided . . . [and] which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory, or unpleasant feelings or opinions against him.

Id. at 773 (footnotes omitted). Defamation consists of two distinct torts: libel and slander. *Id.* at 771. Libel is usually written, while slander is usually oral. *Id.*

According to the *Restatement*, a defamation action consists of the following elements: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." RESTATEMENT (SECOND) OF TORTS § 558 (1976) [hereinafter RESTATEMENT]. *See generally* L. FORER, A CHILLING EFFECT—THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT 71-88 (1987) (discussing libel causes of action).

[3] *See* Note, *Fact-Opinion*, *supra* note 1, at 1819. "Underlying the [opinion] privilege was a view that all criticism, no matter how foolish, should be protected and that the public was entitled to unfettered and widely disseminated opinion." *Id.* (footnotes omitted); *see also* Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1207 (1949) (defendant must show subject matter is of such public interest that he should not be liable in defamation); Note, *Libel and Slander—Fair Comment—Statements of Opinion*, 16 TEX. L. REV. 87, 94 (1937) (individual should be allowed to comment about anything within "bounds of comment or criticism").

[4] 418 U.S. 323, 339-40 (1974) ("However pernicious an opinion may seem, we depend

parties bringing defamation actions are governed by state-adopted standards,[5] the Court in *Gertz* seemed to acknowledge the privileged status of expressions of opinion by stating, in dictum, that "[u]nder the First Amendment there is no such thing as a false idea."[6]

Courts cited this *Gertz* dictum as extending absolute protection to statements of opinion,[7] but could not adequately and uniformly distinguish privileged expressions of opinion from actionable statements of fact.[8] Recently, however, in *Milkovich v. Lorain Journal Co.*,[9] the Supreme Court determined that no "separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment."[10] Writing for the Court, Chief Justice Rehnquist persuaded a majority of Justices that the creation of an absolute opinion privilege in defa-

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for its correction not on the conscience of judges and juries but on the competition of other ideas.").

[5] *Id.* at 347. The Court provided "that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of [a] defamatory falsehood injurious to a private individual." *Id.* However, this created some uncertainty for the states in deciding whether to set the threshold for liability at negligence or at a higher level. *See* Mead Corp. v. Hicks, 448 So. 2d 308, 312 (Ala. 1983) (discussing negligence standard); Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 531-36, 543 P.2d 1356, 1363-66 (1975) (Hawaii utilizes negligence standard); Rosner v. Field Enters., Inc., 564 N.E.2d 131, 158-59 (Ill. Ct. App. 1990) (employing negligence standard), *appeal denied*, 137 Ill. 2d 672, 571 N.E.2d 156 (1991).

[6] *Gertz*, 418 U.S. at 339.

[7] *See, e.g.*, Ollman v. Evans, 713 F.2d 838, 840-41 (D.C. Cir.) (en banc) (*Gertz* dictum provides first amendment protection to all opinions), *vacated*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); Bose Corp. v. Consumers Union, Inc., 692 F.2d 189, 193-94 (1st Cir. 1982) (*Gertz* dictum "implies that an opinion can be neither true nor false as a matter of constitutional law"), *aff'd*, 466 U.S. 486, 514 (1984); Church of Scientology v. Cazares, 638 F.2d 1272, 1286 (5th Cir. 1981) (*Gertz* requires protection for pure comment or opinion).

[8] *See, e.g.*, Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284-87 (1974) (considering whether "scab" was statement of fact); *see also* Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 783-84 (9th Cir. 1980) (court applied three-pronged test that focused on "totality of circumstances").

The test widely used in evaluating this fact/opinion dichotomy considered four factors: (1) the common usage of specific language, (2) the verifiability of the statement, (3) the statement's full context, and (4) the setting surrounding the statement. *See* Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). Numerous courts applied this test. *See, e.g.*, Southern Air Transp., Inc. v. American Broadcasting Co., 877 F.2d 1010, 1016 (D.C. Cir. 1989) (applying *Ollman* factors); Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1288-89 (4th Cir. 1987) (same).

[9] 110 S. Ct. 2695 (1990).

[10] *Id.* at 2707.

mation actions was never intended[11] and that existing constitutional limitations on defamation actions adequately safeguard first amendment freedoms.[12] This viewpoint he alone held six years ago.[13]

This Note will analyze the state of defamation law in the United States following the elimination of the absolute opinion privilege by *Milkovich*. Part One will consider the Supreme Court's application of existing constitutional doctrines to statements of opinion. Part Two will examine the effect of *Milkovich* on the lower courts that are now attempting to decipher new rules concerning "opinion." Part Three will demonstrate that because of the absence of a clear federal standard, state courts increasingly rely on common-law principles when determining whether a statement is defamatory.

I. *Milkovich* ELIMINATES ABSOLUTE OPINION PRIVILEGE

In *Milkovich*, the Supreme Court examined an article published in an Ohio newspaper which implied that Michael Milkovich, a private citizen, perjured himself in a judicial proceeding.[14] The Ohio court, relying on the *Gertz* dictum,[15] as well as on

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[11] *See id.* at 2705. "[W]e do not think this . . . [dictum] from *Gertz* was intended to create a wholesale defamation exception for anything that might be labeled 'opinion.'" *Id.*

[12] *Id.* at 2706.

[13] Ollman v. Evans, 471 U.S. 1127, 1129 (1985) (Rehnquist, J., dissenting). In an earlier unsuccessful attempt to dispel the notion of an absolute opinion privilege, Justice Rehnquist, in a dissenting opinion to a denial of certiorari, wrote that the "lower courts have seized upon the word 'opinion' in . . . [*Gertz*] to solve with a meat axe a very subtle and difficult question." *Id.* In 1990, Chief Justice Rehnquist's majority opinion in *Milkovich* was joined by Justices White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy. *Milkovich*, 110 S. Ct. at 2697.

[14] *Milkovich*, 110 S. Ct. at 2697-98. In 1974 Michael Milkovich coached wrestling at Maple Heights High School in Maple Heights, Ohio. *Id.* at 2698. The team was involved in an altercation with a team from a rival high school in which some people were injured. *Id.* Both Milkovich and H. Don Scott, the superintendent of schools, testified at a hearing held by the Ohio High School Athletic Association ("Association"). *Id.* Subsequently, the Association placed the team on probation for a year and declared the team ineligible for competition in the state championship. *Id.* A suit was brought by parents and wrestlers to restrain the actions of the Association, and both Milkovich and Scott testified at the trial. *Id.* The court overturned the Association's ruling, and the next day an article appeared in a newspaper owned by Lorain Journal Co. stating the following, in pertinent part:

> [B]y the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them. . . . 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.

state and federal case law,[16] found the allegation to be constitutionally protected opinion.[17] In reversing the Ohio court, the Supreme Court reasoned that no bright line exists between fact and opinion[18] and concluded that freedom of expression "is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact."[19]

According to the Court, the main issue to be determined in *Milkovich* was "whether or not a reasonable factfinder could conclude that the statements in the . . . [newspaper] column impl[ied] an assertion that petitioner Milkovich perjured himself in a judicial proceeding."[20] Thus, liability for defamation in the post-*Milkovich* era is no longer grounded in terms of whether a statement is one of fact or opinion, but instead focuses on whether the statement, at least, implies an assertion of fact about a person[21]

Id. at 2699 n.2.

[15] *See id.* at 2698.

[16] *See id.*; *see also* Trump v. Chicago Tribune Co., 616 F. Supp. 1434, 1435 (S.D.N.Y. 1985) (opinion absolutely privileged speech); Chaves v. Johnson, 230 Va. 112, 119, 335 S.E.2d 97, 101-02 (1985) ("Pure expressions of opinion, not amounting to 'fighting words,' cannot form the basis of an action for defamation.").

[17] Milkovich v. News-Herald, 46 Ohio App. 3d 20, 23-24, 545 N.E.2d 1320, 1324-25 (1989) (court found as matter of law that since article contained opinion, it was absolutely immune from action), *rev'd sub nom.* Milkovich v. Lorain J. Co., 110 S. Ct. 2695 (1990).

[18] *Milkovich*, 110 S. Ct. at 2706; *see also* Young Cheerleaders of America v. Data Specialists, Inc., No. 85 C 3972 (N.D. Ill. Oct. 13, 1987) (LEXIS, Genfed library, Dist file) (opinions sometimes contain implied assertions of fact).

[19] *Milkovich*, 110 S. Ct. at 2706.

[20] *Id.* at 2707.

[21] *See* Scheidler v. National Org. for Women, Inc., 751 F. Supp. 743, 745 (N.D. Ill. 1990). In *Scheidler*, the court reversed the dismissal of a portion of the complaint referring to statements that plaintiff "aided and abetted" illegal conduct because, in light of *Milkovich*, the statements were sufficiently factual and capable of being proved false. *Id.*; *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 57 (1988) (parody could not be understood to be statement of facts known by creator); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 285-86 (1974) ("scab" merely literary choice to utilize jargon and illustrates feelings of striking workers); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 13-14 (1970) ("blackmail," in context of news article, merely "rhetorical hyperbole" that denoted no knowledge of underlying facts); White v. Fraternal Order of Police, 909 F.2d 512, 521-23 (D.C. Cir. 1990) (statement concerning drug test).

The *Milkovich* Court suggested the statement, "[i]n my opinion, John Jones is a liar," implies the existence of facts upon which the opinion is based and the speaker is therefore not shielded from liability if the assessment is erroneous or the facts are incorrect or incomplete. *See Milkovich*, 110 S. Ct. at 2705-06. The mere qualification of a sentence with the phrase "in my opinion" does not eliminate the impact on the subject of the allegedly defamatory content. *Id.* at 2706. The Supreme Court asserted that such a statement is not automatically privileged merely because it purports to be an "opinion." *Id.*; *see also* Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980) (charges of crime, though in essence statements of opinion, not constitutionally protected if false).

that is provably false.[22]

Since the Supreme Court eliminated the "absolute opinion" privilege, defamation analysis must now center upon the substance of the statement and the impression created by the words used as they relate to the allegedly defamed person. This standard provides constitutional protection only for "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual."[23]

Recognizing that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation,"[24] the Supreme Court identified certain elements for consideration in defamation actions.[25] According to the Court, two principal factors to be examined are the language employed in the statement[26] and the context in which the statement is made.[27] In *Milkovich*, the article

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[22] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986) ("constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages"). The *Hepps* Court held that requiring the defendant newspaper to prove the truth of the statements in the article linking the plaintiff with organized crime was violative of the United States Constitution. *See id. See generally* Note, Philadelphia Newspapers v. Hepps *Revisited: A Critical Approach to Different Standards of Protection for Media and Non-Media Defendants in Private Plaintiff Defamation Cases*, 58 GEO. WASH. L. REV. 1268, 1279-80 (1990) (discussing *Hepps* falsity requirement).

[23] *Milkovich*, 110 S. Ct. at 2706 (citing *Falwell*, 485 U.S. at 50). When defamatory facts may be gleaned from the statement, there is a cause of action for defamation. *See id.* at 2706-07; *see also* Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990) (statement about product not working); Don King Prods., Inc. v. Douglas, 742 F. Supp. 778, 782-84 (S.D.N.Y. 1990) (statement declaring who won fight); Moyer v. Amador Valley Joint Union High School Dist., 225 Cal. App. 3d 720, 723-24, 275 Cal. Rptr. 494, 495-96 (Cal. Ct. App. 1990) (statement that plaintiff was "babbler" and "worst teacher").

[24] Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

[25] *See Milkovich*, 110 S. Ct. at 2704-07. Justice Brennan, in his dissent, stated that in determining "whether a statement purports to state or imply 'actual facts about an individual,'" the courts have generally relied upon the following indicia: "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." *Id.* at 2709 (Brennan, J., dissenting).

[26] *See id.* at 2704 ("constitutional limits on the *type* of speech which may be the subject of state defamation actions"). In Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), the Court examined the common understanding that a typical reader would attach to an allegedly defamatory statement concerning tactics used by the plaintiff in conducting real estate transactions. *See id.* at 14. A newspaper article, reporting heated debates of the issue, stated that the plaintiff's tactics had been characterized by some as "blackmail." *Id.* The plaintiff sued, but the Court found that the word "blackmail" was not defamatory in these circumstances, since "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff's] negotiating position extremely unreasonable." *Id.*

[27] *See Milkovich*, 110 S. Ct. at 2704-05; Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974). The Court in *Austin*, considering that an

in question neither contained figurative or loose language to negate the impression created by the writer that Milkovich committed perjury, nor did the "general tenor of the article negate this impression."[28] Consequently, although the article was in the format of an editorial column, a "well recognized home of opinion and comment,"[29] the Court determined that liability could ensue if the plaintiff established the falsity of the author's statements.[30]

At common law it was presumed that defamatory speech was false, and the burden of proving the truth of the statement rested with the defendant.[31] In most cases, however, this rule has yielded to the constitutional requirement that the plaintiff prove the falsity of the statement.[32] Thus, a fact/opinion dichotomy seems un-

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allegedly defamatory list of "scabs" appeared in union literature and that similar lists had been published many times in other publications, found that no cause of action vested in any of the members listed. *Id.* at 286. The Court also determined that the context of the statement labeling the private plaintiff a "scab" would not permit a reasonable person to conclude that a factual representation was implied. *Id.* at 282-84.

In Hustler Magazine v. Falwell, 485 U.S. 46 (1988), the Court focused on the format and style of *Hustler Magazine* and refused to permit a cause of action for intentional infliction of emotional distress stemming from an allegedly defamatory advertisement parody. *Id.* at 53-57. The parody was of an advertisement for Campari liqueur that would normally include the name and picture of a celebrity along with a description of the "first time" they sampled the liquor. *Id.* at 48. The *Hustler* parody engaged the sexual double entendre about "first times" and showed an illustration of the public figure plaintiff describing his "first time" as a "drunken incestuous rendezvous with his mother." *Id.* The page contained a disclaimer at the bottom and was listed as "fiction" in the table of contents. *Id.*

[28] *See Milkovich*, 110 S. Ct. at 2707.

[29] *Id.* at 2713 (Brennan, J., dissenting) (quoting Mr. Chow v. Ste-Jour Azur S.A., 759 F.2d 219, 227 (2d Cir. 1985)).

[30] *See id.* at 2707. In sum, the post-*Milkovich* analysis of whether a statement contains an actionable fact considers the reader's common understanding, the nature of the publication and its audience, the format and style of the expression, and the entire context in which the statement was made. *See supra* notes 25-27 and accompanying text (post-*Milkovich* analysis).

[31] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986). The Pennsylvania Supreme Court viewed *Gertz* as requiring the plaintiff to show fault, but not requiring the plaintiff to show the falsity of the statement. *See* Hepps v. Philadelphia Newspapers, Inc., 506 Pa. 304, 318-29, 485 A.2d 374, 385-87 (1984), *rev'd*, 475 U.S. 767 (1986). In *Hepps*, the *Philadelphia Inquirer* published an article stating that a convenience store chain had connections with organized crime and that these connections afforded the chain favorable treatment from the Liquor Control Board and other governmental officials. *Id.* at 308-09, 485 A.2d at 376-77. The trial court held that the Pennsylvania statute, which placed the burden of proving truth on the defendant, violated the United States Constitution. *Id.* at 315, 485 A.2d at 380.

[32] *See Hepps*, 475 U.S. at 776. The Supreme Court recognized the possibility of occasions in which plaintiffs are unable to meet their burden of proof despite the actual falsity of the statement. *Id.* The Court, in order to prevent the chilling of speech on public matters, eliminated the presumption of falsity and the requirement that the defendant in a defama-

necessary since statements that are not provably false will be constitutionally protected whether or not they are in the form of an opinion.[33]

In addition to establishing the falsity of a statement, the defamation plaintiff must demonstrate fault on the defendant's part.[34] The standard of proof for establishing fault depends on whether a public or private plaintiff brings the suit and whether the subject of the statement is a matter of public or private concern.[35] In *New York Times v. Sullivan*,[36] the Supreme Court required a public official plaintiff to prove that a defamatory statement was made with "actual malice," "knowledge that it was false," or "reckless disregard of whether it was false or not."[37] By comparison, when the statement involves a private figure on a matter of public concern, the plaintiff need not prove actual malice, but must satisfy the state-adopted standards for proving that the defendant was at fault.[38] *Milkovich* emphasizes these culpability requirements in concluding that, while there is no distinct "opinion privilege," existing first amendment doctrine dictates "protection for statements

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tion action prove the truth of the statement. *Id.* at 776-77.

[33] *Milkovich*, 110 S. Ct. at 2706. *Milkovich* interpreted *Hepps* as assuring that statements "relating to matters of public concern which [do] not contain a *provably* false factual connotation will receive full constitutional protection." *Id.* (emphasis added; footnote omitted).

[34] *See id.* at 2707.

> [W]here a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz*.

Id. at 2706-07.

[35] *See infra* notes 37-38 and accompanying text (standard of proof).

[36] 376 U.S. 254 (1964).

[37] *Id.* at 279-80. Public officials (for example, heads of executive departments) are granted absolute immunity from prosecution for statements made within their official duties. *See* Barr v. Matteo, 360 U.S. 564, 570 (1959) (citing Spalding v. Vilas, 161 U.S. 483, 498-99 (1896)). The goal of providing immunity is to permit these officials to discharge their duties without fear of constant prosecution for taking a stand on an issue. *Id.* at 571. If a public official makes a statement with "actual malice," however, he is not protected. *Id.* at 569. The Supreme Court believed that the privilege afforded to officials would be unfair unless those private individuals who criticize public officials get the very same protection from prosecution. *See New York Times*, 376 U.S. at 282-83.

[38] *See Gertz*, 418 U.S. at 347 (states may not impose strict liability based on defamation). The *Gertz* Court balanced the competing interests of compensating private individuals and shielding the media from strict liability. *Id.* at 347-48.

of pure opinion."[39]

II. APPLICATION OF *Milkovich*

The elimination of the opinion privilege[40] resulted in courts reexamining defamation law to determine which types of statements are actionable.[41] By definition, a "defamatory statement" is factually false and harms the reputation of its subject,[42] while a "protected statement" is one that cannot be reasonably interpreted to contain factual falsity.[43] Employing the guidelines provided by *Milkovich* together with other basic tenets of defamation law, courts developed a variety of tests to ascertain whether a defamation cause of action exists.

The Ninth Circuit, in *Unelko Corp. v. Rooney*,[44] suggested that *Milkovich* set forth a two-part test for establishing defamation: (1) whether the statement implies an assertion of fact; and (2)

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[39] *Milkovich*, 110 S. Ct. at 2706-07. The in-depth appellate review required by Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 499-500 (1984), sufficiently protects against an action for a form of protected expression. *Milkovich*, 110 S. Ct. at 2707.

[40] *See Milkovich*, 110 S. Ct. at 2705. Federal courts differ in their interpretations of *Milkovich*. *See, e.g.*, Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990) (statement implies assertion of fact if not termed hyperbole), *cert. denied*, 111 S. Ct. 1586 (1991); Scheidler v. National Org. of Women, 751 F. Supp. 743, 745 (N.D. Ill. 1990) ("to be defamatory, the connotation of wrongdoing must be 'sufficiently factual to be susceptible of being proved true or false' "); Don King Prods., Inc. v. Douglas, 742 F. Supp. 778, 782 (S.D.N.Y. 1990) (first amendment contains no defamation exception for opinion).

[41] *See Don King Prods.*, 742 F. Supp. at 781 (winner of boxing match filed counterclaim against promoter of opponent who stated that outcome determined by referee error). The constitutional protection available to protect the statements must derive from the nature of the cause of action as changed by *Milkovich*. *See id.* at 782.

[42] *See* BLACK'S LAW DICTIONARY 417 (6th ed. 1990).

> An intentional false communication, either published or publicly spoken, that injures another's reputation or good name. Holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community; may be criminal as well as civil. Includes both libel and slander.
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> Defamation is that which tends to injure reputation; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.

Id.

The *Restatement* defines "Defamatory Communication" as "[a] communication . . . [that] tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT, *supra* note 2, § 559.

[43] *See, e.g.*, *Unelko*, 912 F.2d at 1053 (no defamation if no implied assertion of fact); *Don King Prods.*, 742 F. Supp. at 783 (no assertion of fact about plaintiff).

[44] 912 F.2d 1049 (9th Cir. 1990).

whether the plaintiff has met its burden of showing falsity.[45] Furthermore, to determine whether the plaintiff satisfied the first prong of the test, the court considered three factors: First, the court searched for "figurative or hyperbolic language" negating the impression that the defendant was serious about his statement. Next, the Court examined the general tenor of the context in which the statement was made. Finally, the court considered whether the statement was "susceptible of being proved true or false."[46]

In *Florida Medical Center, Inc. v. New York Post*,[47] a Florida appellate court stated that under *Milkovich* a court must first evaluate the context, language, content, and audience of the statement to ascertain whether it contains assertions of fact that are provably false.[48] The court must then determine the status of the plaintiff and the nature of the subject matter as either private or public in determining what degree of fault must be demonstrated for the defendant to be liable.[49]

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[45] *Id.* at 1053-58 (application of two-part test to facts in case).

In *Rooney*, a television humorist, Andy Rooney, stated that the plaintiff's product did not perform. *Id.* at 1051. Rooney said,

> Here's something for the windshield of your car called Rain-X. The fellow who makes this sent me a whole case of it. He's very proud of it. I actually spent an hour one Saturday putting it on the windshield of my car. I suppose he'd like a commercial or a testimonial. You know how they hold the product up like this? *It didn't work.*

Id. at 1051. (emphasis added).

As a result, the plaintiff initiated a defamation action. *Id.* Subsequent to the institution of the lawsuit, Rooney rebroadcast his evaluation of the product. *Id.* at 1051-52. The plaintiff, thereafter, amended its complaint for damages caused by the additional statements about the product. *Id.* at 1052.

[46] *Id.* at 1053. The *Rooney* court found that the statement was not "couched in loose, figurative, or hyperbolic language," *id.* at 1054, that the tenor failed to negate the factual statement, *id.*, and that the statement concerned an event that could be easily verified. *Id.* at 1055. Therefore, a factual assertion was established under the *Milkovich* test, and that assertion was subject to the proof of falsity. *Id.* The court found, however, that the plaintiff did not adequately prove the falsity of the statement, and thus could not recover. *Id.* at 1057.

[47] 568 So. 2d 454 (Fla. Dist. Ct. App. 1990).

[48] *Id.* at 458-59. If statements regarding matters of public concern are capable of being proved false under *Hepps*, they are not protected. *Id.* at 458.

[49] *Id.* at 458-60 (discussing constitutional threshold for action in which public official/figure is involved). The *New York Post* case involved a newspaper article containing allegations that the plaintiff hospital was only interested in getting as much money possible from insurance companies, while providing a minimum of services to patients. *Id.* at 555-56. The court determined that the article contained statements about hospital practices that could be defamatory if proved to be false. *Id.* at 459-60. The lower court's dismissal of the cause of action was reversed under the *Milkovich* analysis, and the case was remanded for a determi-

Milkovich is used by other state courts as a barometer to test the state's defamation laws. For example, the California Court of Appeals, in *Moyer v. Amador Valley Joint Union High School District*,[50] asserted that *Milkovich* did not substantially alter the principles already established in the state to protect the individual's reputation without unduly infringing upon freedom of expression.[51] California's interpretation of *Milkovich* appears accurate because its defamation rules are based on federal defamation law[52] and *Milkovich* "recognized that existing constitutional doctrine remained operative to protect the free expression of ideas."[53] However, because no definitive test has yet been formulated, courts must continue their attempts to interpret and synthesize the numerous Supreme Court decisions in order to distinguish protected speech from actionable defamation.

III. STATES HAVE OPINIONS TOO

The absence of a uniform federal system for evaluating allegations of defamation resulted in state courts basing their decisions on independent state grounds.[54] The New Jersey Supreme Court, for example, noting the existence of gaps in federal defamation

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nation of falsity. *Id.*

The Florida court, in applying *Milkovich*, determined that the allegations contained in the news article could lead a reader to believe that the hospital "charges for unnecessary tests and medications; . . . makes major profits by leaving patients in intensive care[;] . . . that its facilities are dirty; and it provides unhealthy foods to its patients." *New York Post*, 568 So. 2d at 459.

[50] 225 Cal. App. 3d 720, 275 Cal. Rptr. 494 (1990).

[51] *Id.* at 724, 275 Cal. Rptr. at 497. It is suggested that California's "test," which was left unchanged after *Milkovich*, contains the same focus as the cases upon which the *Milkovich* decision was grounded. *See supra* notes 25-30 and accompanying text (*Milkovich* focus).

Implicit in the "cannot reasonably be interpreted as stating actual facts" test established by *Milkovich*, 110 S. Ct. at 2706, is the requirement that the language of the statement, its context, full content, and audience be evaluated. *See, e.g., New York Post*, 568 So. 2d at 459 (clearly applying *Milkovich* test to context, language, full content, and audience).

[52] *See Moyer*, 225 Cal. App. 3d at 723-25, 275 Cal. Rptr. at 496. For an explanation of the California "totality of circumstances" test, see Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 260-61, 228 Cal. Rptr. 206, 209, 721 P.2d 87, 90-91 (1986), *cert. denied*, 479 U.S. 1032 (1987). This test includes the examination of the language of the statement, the context, the "nature and full content" of the entire statement, as well as the "knowledge and understanding" of the audience to whom the statement was made. *Id.*

[53] *Moyer*, 225 Cal. App. 3d at 724, 275 Cal. Rptr. at 496 (construing *Milkovich*).

[54] *See, e.g.*, Cassidy v. Merin, 244 N.J. Super. 466, 483, 582 A.2d 1039, 1048 (1990) (New Jersey law); Immuno, A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 252, 567 N.E.2d 1270, 1280, 566 N.Y.S.2d 906, 916, *cert. denied*, 111 S. Ct. 2261 (1991) (New York law).

law,[55] applied its own doctrine of "fair comment" in *Dairy Stores, Inc. v. Sentinel Publishing Co.*[56] The court emphasized that article I, section 6 of the New Jersey Constitution[57] covers freedom of speech and is "more sweeping in scope than the language of the First Amendment, [and] has supported broader free speech rights than its federal counterpart."[58] Furthermore, the court observed that the United States Supreme Court "left open to state courts the prospect of protecting . . . statements [on matters of public interest] through common-law privileges,"[59] and concluded that New Jersey fair comment protections[60] could be overcome only by a plaintiff proving that such a statement was published with "actual malice."[61]

An absolute opinion privilege based solely upon state law was invoked by another New Jersey court in the post-*Milkovich* case of *Cassidy v. Merin.*[62] In *Cassidy*, the New Jersey Superior Court determined that it was not required to consider first amendment principles because the application of New Jersey law was "at least as protective of free speech as federal law would be."[63] The court then stated that since the "defendant's allegedly defamatory statements were 'pure opinion,' " they were "absolutely privileged and

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[55] *See* Sisler v. Ganett Co., 104 N.J. 256, 270, 516 A.2d 1083, 1090-91 (1986). Even in *Milkovich* the Supreme Court stated that on remand the Ohio court may address state law issues. *See Milkovich*, 110 S. Ct. at 2702 n.5. "We do not need the United States Supreme Court to interpret our own state constitution. That is within our province. We have the right to grant greater rights under our state constitution than those bequeathed unto us by the Federal Constitution." Janklow v. Viking Press, 459 N.W.2d 415, 429 (S.D. 1990) (Henderson, J., dissenting) (citations omitted). The door is left open for state courts to have a parallel set of defamation laws concerning opinion, stemming from state constitutions and laws. *See* Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 420-25 (1987) (discussing role of state courts in federal and state constitutional framework); *see also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-97 (1977) (discussing ability of states to construe their own constitutions as granting more protection to citizens than United States Constitution).

[56] 104 N.J. 125, 147, 516 A.2d 220, 231 (1986) (extending fair comment privilege to factual statements).

[57] N.J. CONST. art I, § 6. "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

[58] *Sisler*, 104 N.J. at 271, 516 A.2d at 1091.

[59] *Dairy Stores*, 104 N.J. at 140, 516 A.2d at 228.

[60] *Id.* at 141-44, 516 A.2d at 228 (doctrine of fair comment permits statements to be viewed as "non-libelous" if they concern matters of legitimate public interest).

[61] *Id.* at 150-51, 516 A.2d at 233; *see also* Cassidy v. Merin, 244 N.J. Super. 466, 481-82, 582 A.2d 1039, 1047 (1990) (interpreting *Dairy Stores*).

[62] 244 N.J. Super. 466, 582 A.2d 1039 (1990).

[63] *Id.* at 483, 582 A.2d at 1048.

. . . [could] not support an action for defamation, regardless of whether they were uttered with 'actual malice.' "[64]

Recently, in *Immuno, A.G. v. Moor-Jankowski*,[65] the New York Court of Appeals considered the defamation issues before it, in light of *Milkovich*,[66] but chose to resolve the case independently as a matter of state law.[67] Construing *Milkovich*, the court determined that "except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable."[68] However, the court noted that the rule could chill free speech and result in a "hypertechnical parsing of a possible 'fact' from its plain context of 'opinion' [that] loses sight of the objective of the entire exercise, which is to assure that—with due regard for the protection of individual reputation—the cherished constitutional guarantee of free speech is preserved."[69]

The court of appeals, concerned that post-*Milkovich* defamation rules would not afford New York residents the expansive freedoms of expression permitted under New York's Constitution and

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[64] *Id.* at 482. (New Jersey attorneys sued Commissioner who charged them with violations of professional ethics). *Gertz* permits a state to determine the defamation cause of action when a private plaintiff sues a media defendant. *See Gertz*, 418 U.S. at 346-47.

[65] 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 111 S. Ct. 2261 (1991).

[66] Immuno, A.G. v. Moor-Jankowski, 110 S. Ct. 3266, 3266 (1990) (remanding to review "in light of *Milkovich*"). The case involved a letter to the editor published in the Journal of Primatology that discussed Immuno's plans to construct a hepatitis research facility in Sierra Leone, West Africa. *Immuno*, 77 N.Y.2d at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908. In the letter to the editor, the court found two assertions of fact: that there is no way to test if the chimpanzees are carriers of the hepatitis virus and that the release of carrier-chimpanzees into the wild will endanger the wild population of chimpanzees. *Id.* at 246, 567 N.E.2d at 1275-76, 566 N.Y.S.2d at 911-12. The second prong of the test, proof of falsity, is where the plaintiff's claim in *Immuno* was deemed to fail the *Milkovich* test. *Id.* at 247, 567 N.E.2d at 1276, 566 N.Y.S.2d at 912. There was no proof offered to show that the released chimpanzees would not be carriers of hepatitis and could therefore not pose a threat to the rest of the chimpanzee population. *Id.*

[67] *See infra* note 70 and accompanying text (case decided on independent and adequate state grounds).

[68] *Immuno*, 77 N.Y.2d at 245, 567 N.E.2d at 1275, 566 N.Y.S.2d at 911. *But see id.* at 259-60, 567 N.E.2d at 1284, 566 N.Y.S.2d at 920 (Simons, J., concurring). Disagreeing with the majority's reliance on the context of the statements as controlling, Judge Simons argued that the assertions contained in the letter to the editor could not be proved false and that the plaintiff therefore did not meet his burden of proof under *Milkovich*. *Id.* (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986)). Judge Hancock agreed with this portion of Judge Simon's concurrence. *Immuno*, 77 N.Y.2d at 268, 567 N.E.2d at 1290, 566 N.Y.S.2d at 926 (Hancock, J., concurring).

[69] *Immuno*, 77 N.Y.2d at 256, 567 N.E.2d at 1282, 566 N.Y.S.2d at 918.

common law,[70] commented that one role of the state courts is to supplement certain minimum standards fixed by the United States Constitution to satisfy "local needs and expectations."[71] Furthermore, noting its duty to settle New York law, the court observed that the state of federal defamation law is uncertain because of disagreement among the Supreme Court Justices regarding the application of defamation rules.[72] Considering the merits of the case, the *Immuno* court initially examined "the content of the whole communication, its tone and apparent purpose," and then asserted that its state law approach serves the purposes of defamation law better than the procedure employed by the Supreme Court.[73] The court concluded that by basing its holding on New York defamation law,[74] it furthered "the central value of assuring 'full and vig-

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[70] *Id.* at 248, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913. In *Immuno*, the court sought to protect the core values of the state constitution unique to New York and to prevent uncertainty in future litigation. *Id.* at 250, 567 N.E.2d at 278, 566 N.Y.S.2d at 914; *see also* N.Y. CONST. art. I, § 8. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.* On appeal, Immuno unsuccessfully argued that since the New York Constitution deals with freedom of speech from the perspective of citizens "being responsible" for abusing this right, there was no reason to believe that the New York Constitution offered broader protection for freedom of speech than the federal constitution. Plaintiff-Appellant's Brief on Remand at 20-24, Immuno, A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991) (No. 2345/84) [sic].

[71] *Immuno*, 77 N.Y.2d at 248, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

[72] *Id.* at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

[73] *Id.* Three judges concurred with the majority's holding, but asserted various objections to the court's reasoning. *See id.* at 257-68, 567 N.E.2d at 1282-90, 566 N.Y.S.2d at 918-26 (Simons, Titone, Hancock, JJ., concurring in separate opinions). Judge Simons, in his concurring opinion, criticized the majority for interpreting *Milkovich* in a manner "narrower than necessary" to resolve the matter and for precluding Supreme Court review by deciding the case on independent and adequate state grounds. *Id.* at 257, 567 N.E.2d at 1283, 566 N.Y.S.2d at 919 (Simons, J., concurring).

Judge Titone maintained that although a "dual" approach in federal and state law could be proper in some instances, it was not appropriate in this case. *Id.* at 263 n.*, 567 N.E.2d at 1287 n.*, 566 N.Y.S.2d at 923 n.* (Titone, J., concurring). He further stated that the *Gertz* line of cases was a "false lead" and that the proper approach is for the court to retrace its steps and resume that path with the state common law that existed prior to *Gertz*. *Id.* at 266, 567 N.E.2d at 1288, 566 N.Y.S.2d at 924 (Titone, J., concurring). Judge Titone's position is that state courts should not pass upon constitutional issues when there is an adequate state avenue to pursue. *See id.* at 267, 567 N.E.2d at 1289, 566 N.Y.S.2d at 925 (Titone, J., concurring).

Judge Hancock's position is that although *Milkovich* stresses the importance of interpreting the context of an allegedly defamatory statement, this factual situation was inappropriate for precluding Supreme Court review. *Id.* at 268, 567 N.E.2d at 1290, 566 N.Y.S.2d at 926 (Hancock, J., concurring).

[74] *Id.* at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913. The *Immuno* case was decided on independent and adequate state grounds for three reasons: (1) the state has an expansive

orous exposition and expression of opinion on matters of public interest.' "[75]

CONCLUSION

Freedom of expression is one of the most precious rights of American citizenship. Representatives of all races, religions, and nationalities have sought refuge within the borders of the United States in the hope of securing the right to speak freely. After *Milkovich*, the right of people to express their ideas endures, but with the caveat that their expression cannot contain an express or implied statement of false facts that defames a person. Whether a statement purports to be a person's opinion is no longer determinative in deciding whether it is actionable; courts at the outset must now consider substance rather than form. If the substance of the statement is premised upon accurate, truthful information, no matter what form it takes, the statement will be accorded full constitutional protection.

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history concerning liberty of the press; (2) the court of appeals has a responsibility to settle state law; and (3) the issue was on a motion for summary judgment and the court sought to avoid the extra expense of forcing the litigation to the Supreme Court again, just to have the case remanded and then decided on state grounds. *Id.* at 249-50, 567 N.E.2d at 1277-78, 566 N.Y.S.2d at 913-14. Respondent argued that the court must follow the "settled rule" in New York for defamation causes of action and adhere to *Steinhilber*. Defendant-Respondent Jan Moor-Jankowski's Brief at 50-68, Immuno, A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991) (No. 23545/84).

Another reason for basing the holding on state law was the uncertainty in the Supreme Court regarding the proper application of this new principle to the facts. *Immuno*, 77 N.Y.2d at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914. Justice Rehnquist delivered the opinion of the court in *Milkovich* and found that with the elimination of the opinion privilege there was a definite assertion of fact in the statement that necessitated a trial to determine whether there was proof of falsity. *Milkovich*, 110 S. Ct. at 2707-08 (Justices White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy joined in the decision with Justice Rehnquist). Justices Brennan and Marshall maintained that the Court must be very cautious in expanding defamation causes of action and that in this situation the speech should be constitutionally protected. *Milkovich*, 110 S. Ct. at 2715 (Brennan, Marshall, JJ., dissenting).

According to the New York defamation law applied by the court, the full context of a statement must be examined to understand the perception of the ordinary reader. *See Immuno*, 77 N.Y.2d at 254, 567 N.E.2d at 1280-81, 566 N.Y.S.2d at 916-17; Steinhilber v. Alphonse, 68 N.Y.2d 283, 293, 501 N.E.2d 550, 555, 508 N.Y.S.2d 901, 906 (1986). The New York Court of Appeals believed that this would prevent the *Milkovich* rule from "parsing" allegedly defamatory expressions and uncovering "many more implied factual assertions" than perceived by a reasonable person encountering the expression in its context. *Immuno*, 77 N.Y.2d at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

[75] *Immuno*, 77 N.Y.2d at 255, 567 N.E.2d at 1281, 508 N.Y.S.2d at 917.