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ANDY ROONEY GETS THE LAUGH, BUT RUBS RAIN-X THE WRONG WAY

I. INTRODUCTION

Andy Rooney is well-known as the resident curmudgeon on *60 Minutes*. Once a week he takes the pulse of the nation and reacts to it with all the certainty and credibility of a street smart Captain Kangaroo. One Sunday night he was feeling particularly cantankerous, scratching his head and pontificating on why he receives so many unsolicited presents from viewers. As he sat there looking the gift horses in their collective mouth, he let it be known that he had received a bottle of a windshield coating called Rain-X in the mail, and that it "didn't work."¹ This prompted yet another gift: a sixteen million dollar defamation lawsuit.²

Courts deciding defamation claims have been struggling with the policy conflict between the first amendment right to free speech, which encourages public debate, and the right to proper redress for harm inflicted upon one's reputation.³ Until recently, the lower courts considered opinion a constitutionally protected right.⁴ Plaintiffs bringing defamation actions could not recover if the court ruled that the defendants' statements constituted opinion.⁵

In *Unelko Corp. v. Rooney*⁶ ("Rooney"), the District Court of Arizona held that Andy Rooney's statement was opinion and that he was therefore constitutionally protected from suit.⁷ While the case was on appeal to the Ninth Circuit Court of Appeals, the United States Supreme Court decided *Milkovich v. Lorain Journal Co.*⁸ ("Milkovich"), holding that statements of opinion are not necessarily immune from defamation suits.⁹ However, Andy Rooney again avoided liability for his remarks on *60 Minutes* regarding the plaintiff's product.¹⁰ The circuit court held that although the statement was not a protected expression of opinion, Unelko did not show that the statement was false.¹¹ Thus, the court

1. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1051 (9th Cir. 1990).

2. *See infra* note 21.

3. *See infra* text accompanying notes 186-97.

4. *See infra* text accompanying notes 77-87.

5. *Id.*

6. 912 F.2d 1049 (9th Cir. 1990).

7. *Id.* at 1052.

8. 110 S. Ct. 2695 (1990).

9. *Id.* at 2705.

10. *Rooney*, 912 F.2d at 1050.

11. *Id.* at 1057.

affirmed the lower court's dismissal of the case.¹²

Rooney provided the Ninth Circuit with its first opportunity to apply the Supreme Court's holding in *Milkovich*.¹³ This note explores the common law background to the *Milkovich* decision. It then examines how the *Rooney* court set dangerous precedent by misapplying the *Milkovich* test and making decisions which should have been remanded to the trial court in light of the intervening change in law.

II. STATEMENT OF THE FACTS

In October of 1987, Andy Rooney wrote a column entitled "RAIN" which was published in the *Arizona Republic*.¹⁴ He bemoaned his problems with rain and complained that cars should have "truck-sized windshield wipers" to better clean the entire windshield.¹⁵ Unelko's national sales manager sent Rooney a small supply of Unelko's Rain-X product.¹⁶ He included a letter, stating, "Andy, you don't need those truck-sized windshield wipers — all you need is RAIN-X — 'The Invisible Windshield Wiper.' The one-step, wipe-on automotive glass coating that repels rain, sleet and snow on contact and takes up where windshield wipers leave off!"¹⁷

On the April 17, 1988 broadcast of *60 Minutes*,¹⁸ Rooney did a seg-

12. *Id.*

13. Appellants' Petition for Rehearing and Suggestion for Rehearing En banc at 2, *Rooney*, 912 F.2d 1049 (No. CA 89-15751).

14. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1050 (9th Cir. 1990).

15. *Id.* Rooney's column asserted, "I wish they'd make truck-sized windshield wipers for cars that went straight back and forth across the windshield instead of wiping in that half-moon shape. I imagine they'll get to that because the half-moon shape leaves too much of the windshield unwiped." Appellants' Opening Brief at 4, *Rooney*, 912 F.2d 1049 (No. CV 89-15751).

16. *Rooney*, 912 F.2d at 1050. Rain-X is described by plaintiffs as "a patented and trade-marked transparent polymer coating for windshields and windows that repels rain, sleet and snow by causing it to bead-up and roll off treated glass surfaces instead of filming or flooding the surface and obscuring visibility." Appellants' Opening Brief at 4, *Rooney*, 912 F.2d 1049 (No. CV 89-15751).

17. *Rooney*, 912 F.2d at 1050. The letter continued as follows:

Our President, Howard Ohlhausen, inventor of Rain-X (among other chemical products) first realized the same drawbacks that you referred to in your article as a navigator in the United States Air Force. With these windshield wiper inadequacies in mind, Mr. Ohlhausen invented Rain-X and received a chemical patent in 1972.

Enclosed please find literature outlining the many benefits, applications and properties of this unique material.

In order that you may personally test and evaluate Rain-X performance, we have forwarded a small supply to you today via U.P.S.

We trust that Rain-X will increase your affection for rainy days, while increasing your driving safety, comfort and visibility.

Id. at 1050-51.

18. *60 Minutes* is a popular weekly television news show on CBS.

ment devoted to the junk mail that he had been receiving.¹⁹ At one point, Rooney stated:

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.²⁰

19. *Rooney*, 912 F.2d at 1051. "Rooney, from a prepared, edited, recorded, and approved script, identified Rain-X by name while the camera zoomed in on the bottle . . ." Appellants' Opening Brief at 6, *Rooney*, 912 F.2d 1049 (No. CV 89-15751) (citation omitted).

The text of the segment in full is as follows:

MIKE WALLACE: You think you get junk mail? How would you like to be Andy Rooney? Or, even worse, how would you like to be Andy Rooney's mailman?

ANDY ROONEY: People send me things. I get an awful lot of junk that I don't want that just seems too interesting to throw away. Some people send me stuff because they're friendly. Others, of course, send it because they're looking for a plug on the air.

I get a lot of caps, and a lot of cups. This is a cup from the ship Guam that I spent some time on off Beirut. Captain Quartermaster sent me this; I like it. This is a musical cup. I don't like that much.

I get a lot of music sent me. People send me songs they've written on tape, which I don't listen to. This is a piece of sheet music. It's from a prisoner in Florida, and the song is called 'Lady Liberty, Oh How I Love Thee.' He's in prison for murder, so he's going to be there a long time without liberty.

Hamilton Watch sent me this expensive watch. It's not really proper for me to keep something like this, and I should send it back.

I get pictures of myself. Here's a picture of me at a party with John Chancellor. You probably didn't know I traveled in those circles.

Here's the sort of thing I get a lot of. I don't know why they sent me this. It's a piece of a door. I guess they were pushing some new kind of material.

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.

And then I get books. Holy mackerel, do I get books. Mostly from publishers, but I get a lot from authors, too. They send me their manuscripts. They want me to read them.

Look at this. Several people have sent me this over the years. The illustrator ripped off a picture of me. I suppose I could have sued him, but I was busy that day.

This is the most repulsive thing anyone sent me. It's from some anti-cigarette group. It's an ashtray in the shape of a human lung.

Someone suggested I could neaten up my office with these giant paper clips. Sort of a good idea.

This is one of the best things I ever got. It's an orange peeler. It's changed my life. Simple enough, made by some company in Tulon, Illinois. I have an orange almost every morning of my life, and I love peeling it this way. It really is magic. You can amaze your friends with this. Look at that. There. Presto!

People are very nice. But would you do me two little favors? One, don't send me anything more. And two, don't ask me to send any of this to you.

Rooney, 912 F.2d at 1051.

20. *Rooney*, 912 F.2d at 1051. Plaintiffs assert that they sent Rooney the product literature in care of the *Chicago Tribune*, which syndicated the column, along with a small supply of

In May of 1988, Unelko sued Rooney and CBS for defamation, product disparagement, and tortious interference with business relationships.²¹ Four days later, Rooney made more comments regarding Rain-X on *60 Minutes*, including references to the letters he had received praising the product.²² One letter stated: "If I were Rain-X, I'd sue you."²³ Rooney attempted to revise his position to a more subjective stance by stating: "Well, I said I tried it and it didn't work for me Was I only expected to comment on it if I loved it? What if he'd sent me two tickets to a movie he'd made, and I didn't like the plot? He must

Rain-X for his "personal" test, evaluation, and benefit and *not* in care of CBS or '60 Minutes' for a 'plug on the air,' 'commercial' or 'testimonial' broadcast before a prime time audience of millions of viewers." Appellants' Opening Brief at 5, *Rooney*, 912 F.2d 1049 (No. CV 89-15751).

21. *Rooney*, 912 F.2d at 1051. The suit for \$16 million was filed on behalf of Unelko, the Scottsdale firm that sells Rain-X, and the product's inventor, Howard Ohlhausen. *Id.* at 1052. They alleged that Rooney and CBS caused substantial damage to their reputation and business, by "maliciously broadcast[ing] false and defamatory statements about [Rain-X]." Appellants' Opening Brief at 3, *Rooney*, 912 F.2d 1049 (No. CV 89-15751).

CBS had Mike Wallace read on the air a letter from race-car driver Mario Andretti which praised Rain-X. However, Wallace also remarked that Andretti is a spokesperson for Unelko. *L.A. Times*, May 9, 1988, § 6 (Calendar) at 2, col. 1.

22. *See infra* note 23.

23. Other letters to *60 Minutes* included David Frier's which asserted:

Well, once again you have maligned the innocent in your ever-widening search for the angle behind everything.

I have used Rain-X ever since it was first shown to me by another user of it, a fellow who is a sports rally driver by hobby. I have used it constantly since that day in 1978. Let me assure Andy Rooney and all of you: *It works.*

. . . .
[O]nce it is applied, it performs absolutely everything its manufacturer claims for it. . . .

Perhaps in the future you could have someone more unbiased test a product before maligning it on the air. . . . [Rain-X's] reputation should be vindicated with an on-air retraction

Appellants' Opening Brief at 9, *Rooney*, 912 F.2d 1049 (No. CV 89-15751).

Another letter to *60 Minutes* from viewer Robert DeLay stated as follows:

For the perverse pleasure of a little sensational, show business silliness, you have publicly discredited a remarkable and important product. I have absolutely no interest in the company that manufactures Rain-X. Nor do I sell it. But I *do* use it regularly and, not only does it work, I consider it one of the three or four most significant new products to come on the market in years. And certainly for automobile owners. I wouldn't hesitate to say that this product works miraculously, so I wonder if you really tried it [at] all before you thoughtlessly hurt the company, their employees and their product.

. . . I find it especially appalling that you senselessly embarrass [sic] a legitimate product that not only works *exactly* as advertised but — I believe — could save many lives because of *vastly* increased visibility in bad weather.

Id. at 9-10.

Although Rooney only received letters praising Rain-X, Unelko had received some letters in the past which complained that "[Y]our product simply doesn't work"; "I found the product did not perform as advertised"; and "This product did not work for me." *Rooney*, 912 F.2d at 1051.

know I don't do commercials."²⁴ Unelko thereafter amended its complaint, adding claims for relief based on the second broadcast, alleging that the broadcast was devised to further ridicule Rain-X, and that it contained more false statements of fact.²⁵

Rooney prevailed on a motion for summary judgment.²⁶ Relying on a significant body of Ninth Circuit case law,²⁷ the district court ruled that Rooney's statement that Rain-X "didn't work" was an opinion which was therefore constitutionally protected.²⁸ Unelko appealed to the

24. *Rooney*, 912 F.2d at 1051. The text of the follow-up segment in full is as follows:

BRADLEY: You want to talk money? Big money? Talk to Andy Rooney.

ANDY ROONEY: Tonight I feel like a rich man. Along with CBS, I'm being sued for \$16 million. I hope they take American Express. You may recall that three weeks ago I talked about things people have sent me. One of the items was this product, called Rain-X, made by the Unelko Corporation of Scottsdale, Arizona. The tag on this three and a half ounce bottle says that it lists for \$6.59, sells for \$3.70.

'Dramatically improves wet weather visibility, even without wipers. Repels rain, sleet and snow. Makes frost, bugs, mud and grime easy to remove.'

Well, I said I tried it and it didn't work for me. No matter what you say on '60 Minutes,' you get a reaction. The clock was still ticking when I got a call from a fellow at a local boatyard in our town, saying he'd come right over and show me how to use Rain-X.

Then we got letters saying it was a good product. David Frier of Silver Spring, Maryland, says, 'Granted, the product is not easy to apply correctly, but once it is applied, it performs absolutely everything its manufacturer claims for it.' John Wadsworth of Greensburg, Pennsylvania, says it works 'if you use just water and not window cleaner in your windshield sprayer.' Robert Delay of Ettawa, Tennessee, says, 'If I were Rain-X, I'd sue you.' June Willis of Houston says, 'I think you owe the inventor, Howard Ohlhausen, an apology.' Well, I'll tell you, June, he'd have a lot easier time getting an apology out of me than \$16 million. Jim Mills, Automotive News western sales manager, says, 'Your comments about Rain-X were very unfair.'

Several letters said that Rain-X works best when you're going fast, and maybe that was my trouble. I called American Airlines trying to find out what they think of Rain-X, and I called several automobile manufacturers, to see what they say about it, but I didn't get any help here because they don't use it, and I haven't been able to find out what Rain-X is made of.

So that's my problem tonight, friends. This fellow sent me this product to evaluate, and I did. Was I only expected to comment on it if I loved it? What if he'd sent me two tickets to a movie he'd made, and I didn't like the plot? He must know I don't do commercials. But, in spite of all that, to tell you the truth, I feel sort of bad about the whole thing. Please don't send money unless I ask for it.

Id. at 1051-52.

25. Appellants' Opening Brief at 15, *Rooney*, 912 F.2d 1049 (No. CV 89-15751). Unelko also increased its demand to \$22 million. Appellees' Answering Brief at 3, *Rooney*, 912 F.2d 1049 (No. CV 89-15751).

26. *Rooney*, 912 F.2d at 1052.

27. The district court relied on *Ault v. Hustler Magazine*, 860 F.2d 877, 880 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1532 (1989) (an action does not lie under the first amendment where a challenged statement is one of opinion rather than fact) and *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983) ("[A]n opinion is simply not actionable defamation.") *Rooney*, 912 F.2d at 1052-53.

28. To justify his conclusion that Rooney's statement could only be viewed by the audience as opinion, the trial judge stated:

[I]t can hardly be disputed that those who turn in to watch Andy Rooney on '60

Ninth Circuit Court of Appeals,²⁹ but while the case was under appeal, the United States Supreme Court decided that commentary is privileged only if it is distinctly presented as an opinion — not as objective fact.³⁰

III. BACKGROUND: THE FACT V. OPINION DISTINCTION AND ITS DEMISE

A. Common Law Development of Defamation Law

A constitutional privilege based on the first amendment has provided protection of differing extents to the media from defamation suits. Prior to *New York Times Co. v. Sullivan*³¹ ("*Sullivan*"), however, no constitutional privilege was recognized, and the common law imposed strict liability in libel suits without regard to fault.³² Statements of opinion were actionable in defamation suits if "the expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."³³ Thus, there was a great deal of self-censorship in regard to conjectural material, because of the increased danger of liability and expensive litigation. As the Supreme Court noted in *Gertz v. Robert Welch, Inc.*,³⁴ "allowing the media to avoid liability

Minutes' understand that his comments and statements are humorous, satirical, full of ridicule and often to be taken with a grain of salt. His audience realizes that what they get from Rooney is not a factual summation of the news but rather Rooney's opinions on a variety of subjects. Thus, they are less likely to take his comments seriously or as the absolute truth than they would statements from a newspaper or news program whose purpose is to report factual news stories. As a result, the facts surrounding the publication of Rooney's statements support a finding that, rather than constituting statements of fact in the defamatory sense, Rooney's comments evolved from his own opinion of the product and were understood by the audience as such.

Appellants' Opening Brief at 10, *Rooney*, 912 F.2d 1049 (No. CV 89-15751) (quoting Order at 18-19 (excerpt of Record at 34-35)).

The trial judge also stated that "whether Rain-X works is a subjective determination capable of producing divergent opinions among those who try it. *Id.* at 10-11 (quoting Order at 23 (excerpt of Record at 39)).

29. *Rooney*, 912 F.2d at 1050.

30. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990).

31. 376 U.S. 254 (1964).

32. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2703 (1990).

[T]he common law position was to impose liability despite the lack of intent, recklessness or negligence on the part of the defendant In other words, the common law was to the effect that if the defendant was at fault in publishing the statement to a third party and it was reasonably understood to defame the other he was subject to liability. This amounted to the imposition of strict liability, or 'liability without fault' with regard to the falsity and the defamatory character of the statement.

RESTATEMENT (SECOND) OF TORTS, § 580B comment b (1977).

33. *Milkovich*, 110 S. Ct. at 2703 (quoting RESTATEMENT (SECOND) OF TORTS, § 566 comment a (1977)).

34. 418 U.S. 767 (1986).

only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.”³⁵

B. *The Privilege of Fair Comment*

The privilege of fair comment emerged in response to the burdensome defamation laws which stifled public debate.³⁶ The burden was on a media defendant to present a defense by proving the truth of the statement. “The principle of ‘fair comment’ afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.”³⁷ The majority rule applied the privilege of fair comment only to an expression of opinion.³⁸ In the case of an opinion, liability was avoided only by showing that the statement was based upon true facts which justified the opinion. The privilege did not apply to a false statement of fact, even one implied from an expression of opinion.³⁹ The theory of the privilege was balancing the need for public debate against the need to provide remedies to citizens injured by irresponsible speech.⁴⁰ However, this common law principle was restrictive, since the opinion or comment had to be fully justified by true facts, and it has since been displaced by constitutional principle.⁴¹

C. *New York Times v. Sullivan and Its Progeny*

In *Sullivan*, the Court relaxed the strict liability standard.⁴² Based on the first amendment guarantees of freedom of speech and press, the Court imposed constitutional limitations upon state libel laws.⁴³ Unless the plaintiff could prove actual malice, the constitutional privilege provided a defense to claims arising out of false statements about public officials conveyed to the public via the media.⁴⁴ Actual malice was defined as publication with actual knowledge of falsity or with reckless disregard of probable falsity.⁴⁵

35. *Id.* at 340.

36. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2703 (1990).

37. *Id.* (quoting 1 F. HARPER & F. JAMES, *LAW OF TORTS* § 5.28 at 456 (1956) (footnote omitted)).

38. RESTATEMENT (SECOND) OF TORTS § 566 comment a (1977).

39. *Id.*

40. *Milkovich*, 110 S. Ct. at 2703.

41. Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 *FORDHAM L. REV.* 761, 765 (1990).

42. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

43. *Id.* at 283.

44. *Id.*

45. *Id.* at 280.

Sullivan was the United States Supreme Court's first decision defining constitutional protection of speech and the press from a state libel action brought by a public official.⁴⁶ *Sullivan* was an elected Commissioner in Alabama.⁴⁷ On March 29, 1960, the *New York Times* carried a full page advertisement entitled "Heed Their Rising Voices," which stated that "[a]s the whole world knows by now, thousands of Southern Negro students are engaged in wide-spread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights."⁴⁸ The article went on to describe violent opposition to peaceful protests by Martin Luther King, Jr. and others.⁴⁹ *Sullivan's* name was not mentioned, but he alleged that the article attributed misconduct to him as the Commissioner who was in charge of supervising the Alabama Police department.⁵⁰ The Court acknowledged that although some of the descriptions in the article were not accurate, requiring absolute truth would inevitably lead to "self-censorship."⁵¹ Thus, it found:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁵²

The Court concluded that *Sullivan* did not show actual malice.⁵³

Three years later, in *Curtis Publishing Co. v. Butts*⁵⁴ ("*Curtis Publishing*"), the Supreme Court also applied a constitutional privilege to statements regarding public figures who were not public officials.⁵⁵ Wally Butts, the coach of the University of Georgia's football team, brought a suit because of a story printed in the *Saturday Evening Post* which alleged that he had conspired to "fix" a football game with Bear

46. *Id.* at 256.

47. *Sullivan*, 376 U.S. at 256.

48. *Id.*

49. *Id.* at 256-58.

50. *Id.* at 258.

51. *Id.* at 279.

52. *Sullivan*, 376 U.S. at 279-80.

53. *Id.* at 285-86.

54. 388 U.S. 130 (1967).

55. One becomes a public figure by virtue of one's position or by "thrusting [one's] personality into the 'vortex' of an important public controversy." *Id.* at 155. Public figures attract sufficient public interest and have "sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 377 (1926) (Brandeis, J., dissenting)).

Bryant of the University of Alabama.⁵⁶ Although Butts was employed by a private corporation rather than the state, the Court concluded that he was a public figure.⁵⁷ Even though Butts was not considered a public official, the Court held that the *Sullivan* test could also apply to public figures "who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."⁵⁸ Thus, Butts could only prevail upon "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."⁵⁹

In 1971 the Supreme Court extended the constitutional privilege in *Rosenbloom v. Metromedia*⁶⁰ ("*Rosenbloom*"). Statements regarding private individuals were privileged when the statements involved matters of public interest, unless the plaintiff could prove that the media had actual knowledge of falsity or reckless disregard of probable falsity.⁶¹ Rosenbloom was arrested during a police raid at a bookstore for obscene books.⁶² A radio news reporter reported his arrest, using the terms "smut literature racket" and "girlie-book peddlers" to describe the arrestees.⁶³ After Rosenbloom was acquitted, he sued for libel but he did not prevail.⁶⁴ Even though Rosenbloom was neither a public official nor a public figure, the Court held that the *Sullivan* standard applied because a media defendant had made the statements and they involved a matter of public or general interest.⁶⁵ However, the Court offered no guidance for determining whether a statement involves a matter of public concern, purposefully leaving "the delineation of the reach of that term to future cases."⁶⁶

Fifteen years later, the Supreme Court decided *Philadelphia Newspapers, Inc. v. Hepps*⁶⁷ ("*Philadelphia Newspapers*"), which rendered it even more difficult for a plaintiff to prevail against a media defendant in a defamation action. Hepps was the principal stockholder of a corporation

56. *Curtis Publishing*, 388 U.S. at 135.

57. *Id.* at 154.

58. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2703 (1990) (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result)).

59. *Curtis Publishing*, 388 U.S. 130, 155.

60. 403 U.S. 29 (1971).

61. *Id.* at 31-32.

62. *Id.* at 32-33.

63. *Id.* at 34-35.

64. *Id.* at 36.

65. *Rosenbloom*, 403 U.S. at 44, 52.

66. *Id.* at 44-45.

67. 475 U.S. 767 (1986).

that franchised a chain of "Thrifty Stores" which sold beer, soft drinks and snacks.⁶⁸ Defendant Philadelphia Newspapers published in the *Philadelphia Inquirer* a series of articles alleging that Hepps, his corporation, and some of its franchisees were connected to organized crime and used these connections to influence the government.⁶⁹ The Court once again endeavored to determine a just compromise "between the law of defamation and the freedoms of speech and press protected by the [f]irst [a]mendment."⁷⁰ From its prior decisions, the Court discerned "two forces that may reshape the common-law landscape to conform to the [f]irst [a]mendment."⁷¹ These two forces were: (1) the distinction between a plaintiff who was a public official or public figure and the plaintiff who was a private figure; and (2) whether the speech is of public concern.⁷² If both forces were deemed public, then the Court concluded that the Constitution provided a much higher barrier to a plaintiff's recovery than the common law.⁷³ If neither were public, then the constitutional directives did not necessarily force any change in the features of the "common-law landscape."⁷⁴ The Court stated that "[i]n a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech."⁷⁵ Thus, the Court held that "at least where a newspaper publishes a speech of public concern, a private figure plaintiff cannot recover damages without also showing that the statements at issue are false."⁷⁶

D. *Opinion as a Constitutional Privilege*

Retreating from the broad coverage of the privilege provided by *Rosenbloom*, the Supreme Court, in *Gertz v. Robert Welch, Inc.* ("*Gertz*"),⁷⁷ tried to more fairly balance the state's interest in protecting reputation with the media's competing interest in protection from strict liability. *Gertz* involved a policeman in Chicago who shot and killed a boy.⁷⁸ Elmer Gertz was an attorney who agreed to represent the decedent's family

68. *Id.* at 769.

69. *Id.*

70. *Id.* at 768.

71. *Id.* at 775.

72. *Philadelphia Newspapers*, 475 U.S. at 775.

73. *Id.*

74. *Id.*

75. *Id.* at 776.

76. *Id.* at 768-69.

77. 418 U.S. 323 (1964).

78. *Id.* at 325.

in civil litigation against the policeman.⁷⁹ Robert Welch, Inc. was the publisher of *American Opinion*, which was a newsletter espousing the views of the John Birch Society.⁸⁰ An article published in *American Opinion* accused Gertz of being a Communist and part of a nationwide scheme to discredit local law enforcement agencies and erect a Communist police force.⁸¹ Even though Gertz was a private individual, the Court required some finding of fault for recovery, holding that as long as the states did not exact a strict liability standard, they could define for themselves the standard of liability for a publisher or broadcaster of a defamatory falsehood which injures a private individual.⁸² In finding that the standard of liability should not be as high for private individuals, the Court explained:

Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.⁸³

However, dictum in *Gertz* became the basis for the states to recognize an absolute constitutional privilege for opinion.⁸⁴

Under the [f]irst [a]mendment 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.⁸⁵

The lower courts had difficulty deciding how to apply this distinction between fact and opinion.⁸⁶ Judge Friendly once noted that this

79. *Id.*

80. *Id.* Beginning in the early 1960's, the newsletter had warned its readers of "a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship." *Id.*

81. *Gertz*, 418 U.S. at 326.

82. *Id.* at 347. The Court also held that for libel plaintiffs to recover presumed or punitive damages, they must show actual knowledge of falsity or reckless disregard of probable falsity. However, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755-56 (1985), five justices held that these damages were recoverable without such a showing, so long as the plaintiff is a private individual and the statements do not involve matters of public concern.

83. *Gertz*, 418 U.S. at 344 (footnote omitted).

84. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705-06 (1990).

85. *Gertz*, 418 U.S. at 339-40 (footnote omitted).

86. Several jurisdictions have held statements privileged by characterizing them as rhetorical hyperbole that no reasonable reader could construe as actual fact. Other courts have adopted the standard proposed in the Restatement (Second) of Torts. Under the Restatement, the court inquires whether the author presented all the facts on which she based her opinion. If the statement 'does not imply the existence of

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."⁸⁷ However, until the *Milkovich* holding, lower courts continued to recognize a privilege for opinion.

E. *The Latest Chapter: Milkovich v. Lorain Journal Co.*

Although the Supreme Court's libel precedents had never created a specific protected category for "opinion," most state courts and all of the federal appellate courts had done so since the *Gertz* decision in 1974.⁸⁸ The 1990 *Milkovich* ruling reversed the cases which were based upon the premise that opinion is constitutionally privileged, holding that the threshold inquiry is not whether a defamatory statement "might be labeled 'opinion,'" but rather whether a reasonable factfinder could determine that the statement "impl[ies] an assertion of objective fact."⁸⁹ Writing for the majority, Chief Justice Rehnquist asserted that a separate "opinion" privilege was not necessary since ample protection was provided to first amendment rights by existing constitutional doctrine.⁹⁰

undisclosed defamatory facts,' the statement is protected opinion. Still other courts have adopted a totality of the circumstances test. . . . In addition to the uncertainties inherent in each test, the variety of possible tests adds to the confusion.

The Supreme Court, 1989 Term: Leading Cases, 104 HARV. L. REV. 219, 225-26 (1990) (footnotes omitted).

The four-part test that the District of Columbia Circuit used to decide *Ollman v. Evans* 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985) became a widely used standard. It requires that a court examine "'the common usage or meaning of the allegedly defamatory' statement, whether the statement is verifiable, the 'context in which the statement occurs,' and the broader social context of the statement." *The Supreme Court, 1989 Term: Leading Cases*, supra, at 226 (quoting *Ollman*, 750 F.2d at 979-84). See also Note, supra note 41, at 762 (after examining several lower court holdings, noting that "[o]n their face, these contradictory holdings seem odd. . . . Even more striking, however, each court asserted that it distinguished fact from opinion by using the influential four-factor test formulated in *Ollman v. Evans*.").

87. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705 (1990) (quoting *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 61 (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. Under this view, the language was merely a reiteration of Justice Holmes' classic 'marketplace of ideas' concept." *Milkovich*, 110 S. Ct. at 2705 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

88. *Greenhouse, High Court Narrows Shield in Libel Law*, N.Y. Times, Jun. 22, 1990, § A at 17, col. 4.

89. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705 (1990).

90. *Id.* at 2707. Statements regarding matters of public concern must be provable as false to find a media defendant liable. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). Also, statements that could not reasonably be interpreted as asserting actual facts about the plaintiff are protected. See e.g., *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 13 (1970) (defendant's use of the word "blackmail" in his commentary was not intended to accuse the plaintiff of a criminal offense).

Milkovich was a high school wrestling coach whose team was involved in an altercation at a wrestling match.⁹¹ There was an investigatory hearing before the Ohio High School Athletic Association ("OHSAA") at which Milkovich and School Superintendent Scott testified.⁹² OHSAA subsequently placed Milkovich's team on probation.⁹³ Milkovich and Scott testified again before a county court which overturned OHSAA's ruling.⁹⁴ The next day The Lorain Journal Company's newspaper published a column written in the sports section.⁹⁵ The article implied that Milkovich had lied under oath.⁹⁶ Milkovich sued Lorain Journal Company and the article's writer for defamation, alleging that the column constituted libel per se, since it damaged his reputation as a teacher and a coach by accusing him of committing perjury.⁹⁷

The trial court granted summary judgment against Milkovich, and the Ohio Court of Appeals affirmed.⁹⁸ The appellate court's judgment was based in part on the grounds that the article constituted protected opinion.⁹⁹ Ohio's Supreme Court dismissed Milkovich's appeal, and the

91. *Milkovich*, 110 S. Ct. at 2698.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Milkovich*, 110 S. Ct. at 2698. The column's heading read: "Maple beat the law with the 'big lie,'" under which were the words "TD Says." The text of the column was as follows: [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.

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

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

....

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

But they got away with it.

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

I think not.

Id.

97. *Id.* at 2699-700.

98. *Id.* at 2701.

99. *Id.* Superintendent Scott had been pursuing his defamation claim through the Ohio courts as well. There, the Ohio Supreme Court used the *Ollman* test from *Ollman v. Evans*, 750 F.2d 970 (1984), cert. denied, 471 U.S. 1127 (1985), to uphold the lower court's entry of summary judgment. In analyzing the third factor, "the general context of the statement," the court found that " 'the large caption 'TD says' . . . would indicate to even the most gullible

United States 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."¹⁰⁰

The Supreme Court reversed, concluding that there is not necessarily a separate opinion privilege which would prohibit the application of a state's libel laws.¹⁰¹ In repudiating a separate privilege for opinion, the Court explained that the breathing space that freedoms of expression need to survive "is adequately secured by existing constitutional doctrine"¹⁰² The Court found an implied assertion of fact in the defendant's statement (that a high school wrestling coach lied at an athletic association hearing) because three conditions were satisfied:

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.¹⁰³

The Court asserted that its decision balanced the constitutional right to "free and uninhibited discussion of public issues"¹⁰⁴ against the important social values that underlie defamation law and society's "pervasive

reader that the article was, in fact, opinion.' " *Milkovich*, 110 S. Ct. at 2700 (quoting *Scott v. News-Herald*, 25 Ohio St.3d 243, 252, 496 N.E.2d at 707). With respect to the fourth factor, the "broader context" in which the statement appeared, "the court concluded that, since the article was in the sports page, 'a traditional haven for cajoling, invective, and hyperbole,' " the article would be construed as opinion. *Id.* at 2701 (quoting *Scott*, 25 Ohio St.3d at 253-54, 496 N.E.2d at 708).

Therefore, when the instant case came before the Ohio Court of Appeals, it considered itself bound by the Ohio Supreme Court's holding in *Scott* that the article was constitutionally protected opinion and affirmed the lower court's order for summary judgment. *Id.*

100. *Milkovich*, 110 S. Ct. at 2701.

101. *Id.* at 2705. One commentator found evidence that Justice Souter will probably agree with Rehnquist's argument in *Milkovich*: "In a 1989 New Hampshire case, for example, he voted to affirm the conviction of a man who placed signs on public property espousing the unpopular views of a candidate. Judge Souter held that First Amendment rights must give way to the public's right not to be confronted with offensive views." Garbus, *Courting Libel*, 251 THE NATION 16, Nov. 2, 1990, at 548.

See also, Wash. Post, Nov. 18, 1990, (Book World) at 15 ("With the subsequent retirement of Justice Brennan [after *Milkovich*], a firm defender of freedom of the press, the [C]ourt's tilt in the opposite direction is likely to increase.").

102. *Milkovich*, 110 S. Ct. at 2706 (quoting *New York Times v. Sullivan*, 376 U.S. 254 at 272 (1964)).

103. *Id.* at 2707.

104. *Id.*

and strong interest in preventing and redressing attacks upon reputation."¹⁰⁵

IV. THE ROONEY COURT'S REASONING

Milkovich overruled the cases which had supported the district court's dismissal of Unelko's suit on grounds that Rooney's statement was protected opinion.¹⁰⁶ *Milkovich* rendered the "opinion" test obsolete.¹⁰⁷ The Ninth Circuit Court of Appeals decided that the record was fully developed so that the court could apply the *Milkovich* analysis to determine whether the statement "It doesn't work" implies an assertion of fact and whether Unelko met its burden of proof in showing falsity.¹⁰⁸ The court found that Rooney's statements were presented as objective fact, so his commentary was not privileged.¹⁰⁹ However, the case was dismissed on the grounds that Unelko did not show that the comments were false.¹¹⁰

A. Does "It Didn't Work" Imply an Assertion of Fact?

The Ninth Circuit held that under *Milkovich*, Rooney's statement was an implied assertion of fact.¹¹¹ The plaintiffs argued:

[Rooney] did not describe [Rain-X's] function or purpose and did not subjectively identify Rain-X as a 'good' product or a 'bad' product. Rooney did not state that he 'liked' or 'didn't like' the product. He stated as fact, 'I actually spent an hour one Saturday putting it on the windshield of my car It

105. *Id.* at 2707 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

106. See *supra* text accompanying notes 14-30.

107. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990). The court also noted that the new test does not remove protection from "pure opinion," or statements which do not imply facts capable of being proved true or false. "Thus, there remains much truth in the old adage: 'You should not say it is not good. You should say you do not like it, and then, you know, you're perfectly safe.'" *Id.* at n.2, (quoting *Workman Quote-a-Day Calendar*, at June 26, 1990 (quoting James MacNeil Whistler)).

108. *Id.* at 1053. The circuit court relied upon the rule from *Jackson v. Southern Cal. Gas Co.*, 881 F.2d 638, 643 (9th Cir. 1989), basing its "ruling on any ground finding support in the record." *Rooney*, 912 F.2d at 1053. The court reasoned that "[m]uch of the district court's analysis is relevant in determining whether 'It didn't work' is a factual statement. The district court's order discusses Unelko's evidence of falsity at length." *Id.*

109. *Rooney*, 912 F.2d at 1055.

110. *Id.* at 1050. Howard Ohlhausen, the inventor of Rain-X, commented that "[i]t appears, regretfully, that the court did not see fit to review, nor make any attempt to understand, [the evidence]." 101 *Ariz. Republic* 102, Aug. 27, 1990, § B at 3. He felt that there was "no question" that Rooney's stardom influenced the court. *Id.*

111. *Rooney*, 912 F.2d at 1055. Rooney relied on *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988), which held that speech is protected when it could not reasonably be interpreted as asserting actual facts about the product. *Rooney*, 912 F.2d at 1053.

didn't work.' Rooney even admitted in his deposition that what he 'meant' by the sentence 'It didn't work' was that the product 'did not work. It did not do what it said it would do. My windshield did not look like the picture on this box. It did not work this way.'¹¹²

Defendant CBS disagreed with this aspect of the decision. "It has always been our belief that these were not statements of fact, but that they were inherently unreliable comments because they reflect Mr. Rooney's personal experience with the product."¹¹³ The circuit court applied the Supreme Court's *Milkovich* test to determine whether Rooney's statement that Rain-X "didn't work" could be viewed as implying an assertion of fact.¹¹⁴ It analyzed the following factors:

(1) whether Rooney used figurative or hyperbolic language that would negate the impression that he was seriously maintaining that Rain-X did not perform effectively; (2) whether the general tenor of Rooney's segment of '60 Minutes' negated this impression; and (3) whether the assertion that a product works is susceptible of being proved true or false.¹¹⁵

1. Was Rooney's Statement that Rain-X "Didn't Work" Couched in Figurative or Hyperbolic Language?

The court decided that Rooney's statement was "not couched in loose, figurative or hyperbolic language."¹¹⁶ To some extent, Rooney's commentary was characterized by hyperbole with statements such as "I suppose I could have sued him, but I was busy that day," "This is the most repulsive thing anyone sent me," and "This is one of the best things I ever got."¹¹⁷ The court acknowledged that "[g]iven the flavor of Rooney's comments, an audience might anticipate rhetoric or hyperbole, rather than a factual assessment of Rain-X's capabilities."¹¹⁸ However,

112. Appellants' Opening Brief at 8, *Rooney*, 912 F.2d 1049 (No. CV 89-15751) (quoting Rooney's deposition). The picture on the box to which Rooney referred depicted the performance of Rain-X through a windshield, one-half of which was treated with Rain-X and one-half of which was untreated.

113. Wall Street J., Aug. 30, 1990 at B8, col. 1 (quoting Helen Gold, in-house counsel for CBS).

114. *Rooney*, 912 F.2d at 1053.

115. *Id.*

116. *Id.* at 1054. The court used the Ninth Circuit test to determine if Rooney's statements were couched in figurative or hyperbolic language. They "examine[d] the statement in its totality in the context in which it was uttered or published." *Id.* (quoting *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980)).

117. *Id.*

118. *Id.*

the court denied that this factor weighed in favor of protecting Rooney from liability because "[i]t produces the impression that Rooney is maintaining that Rain-X failed to perform as guaranteed, the context of his broadcast notwithstanding."¹¹⁹ Although the flavor of Rooney's commentaries might lead one to expect rhetorical hyperbole instead of a factual critique of Rain-X, his statement, "It didn't work," gave the impression that Rooney was asserting that Rain-X failed to perform as promised.¹²⁰

2. Did the Tenor of Rooney's Broadcast Negate the Impression that He Was Making a Factual Assertion?

The district court decided that because the tenor of Rooney's segment was humorous and satirical his statement was protected opinion.¹²¹ However, the Ninth Circuit disagreed, holding that the segment was not protected due to the overall tenor of his *60 Minutes* segment.¹²² The humorous and satirical nature of Rooney's commentary did not negate the impression that he was asserting as fact that the product was ineffective when he applied it to his automobiles.¹²³ The court concluded that a reasonable person could construe Rooney's statement as implying an assertion of objective fact,¹²⁴ stating:

The humor in Rooney's statement about Rain-X is derived not from hyperbole or exaggeration, but from the fact that his report of the product's effectiveness was the antithesis of what its inventor presumably desired. Rooney's negative evaluation of Rain-X's capabilities differs significantly from his personal assessment of the other items he received in the mail; thus, it receives no protection based on the overall tenor of his '60 Minutes' segment.¹²⁵

3. Is "It Didn't Work" Sufficiently Factual to Be Susceptible of Being Proved True or False?

The circuit court also found that the statement was sufficiently factual to be proved true or false, disagreeing with the district court which

119. *Rooney*, 912 F.2d at 1054.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Rooney*, 912 F.2d at 1054. "Although part of a humorous report, the statement 'It didn't work' was presented as fact and understood as such by several viewers who wrote to CBS." *Id.*

125. *Id.*

held that the functions Unelko promised Rain-X would perform depended only upon subjective standards.¹²⁶ Although the district court's reasoning may have been correct under the prior standard for opinions, the appellate court explained that "whether the facts implied by Rooney's 'opinion' are susceptible of being proved true or false is a different matter."¹²⁷ The label on the Rain-X bottle reads:

Dramatically improves wet weather visibility — extends & expands your field of vision — lets you see clearly with and without wipers! Covers windshields, side and rear windows, mirrors & lights with an invisible shield that disperses rain, sleet & snow on contact — shrugs off bugs, frost, salt, mud & grime, makes cleaning a snap. Whatever the weather, whatever you drive — use [R]ain-X for increased all-around visibility, safety, & driving comfort.¹²⁸

Whether Rain-X lives up to each of these promises depends upon "a core of objective evidence."¹²⁹ Therefore, the statement "It didn't work" was "an articulation of an objectively verifiable event."¹³⁰

B. *Did Unelko Meet Its Burden of Showing Falsity?*

Since the statement "It didn't work" was not shielded from liability under the *Milkovich* standard, the propriety of the district court's grant of summary judgment depended upon whether Unelko created a triable

126. *Id.* at 1054-55. The circuit court recited the lower court's analysis of the subjectivity of the statement, "It didn't work," as applied to Rain-X:

As an example, whether or not a lightbulb works is an objective determination. Either it gives off light or it doesn't. Its performance is constant. Consequently whether it works can be determined solely by one's own sensory perception; there is no room for differences of opinion. Other products are incapable of such objective determination. Whether they work depends upon one's subjective evaluation or opinion, which may be influenced by a multitude of differing factors, conditions, situations and perspectives. Rain-X is in the latter category as evidenced, in part, by the letters in the record from consumers expressing both pleasure and displeasure with the product. Consequently, whether Rain-X works is a subjective determination capable of producing divergent opinions among those who try it. When Rooney stated 'it didn't work,' he was simply expressing his opinion of the product. As a result, in this context no defamatory meaning can be attached to Rooney's statement.

Id.

127. *Id.* at 1055.

128. *Id.*

129. *Rooney*, 912 F.2d at 1055 (quoting *Milkovich*, 110 S. Ct. at 2707).

130. *Id.* (quoting *Scott v. News Herald*, 25 Ohio St.3d 243, 252, 496 N.E.2d 699, 707 (1986)). The *Rooney* court also distinguished the statement "It didn't work" from the satirical description of "a drunken incestuous rendezvous [between the plaintiff and] his mother in an outhouse" which was at issue in *Hustler Magazine v. Falwell*, 485 U.S. 46, 48 (1988). *Rooney*, 912 F.2d at 1055.

issue of fact as to the falsity of Rooney's statements.¹³¹ A factual statement only needs to be substantially true to be protected from a defamation suit.¹³² However, the court held that Unelko did not make a sufficient showing of falsity to avoid a grant of summary judgment.¹³³

Unelko argued that summary judgment should not have been granted because Rooney's assertion that he had used Rain-X was false, as were the facts implied by the statement that Rain-X "didn't work."¹³⁴ The court decided that for purposes of this analysis, Rooney's statement "It didn't work" implied the factual assertions which he made at his depositions: that Rain-X "hazed over when the windshield wiper went one way and tended to smear," that it made his windshield "splotchy," and that the "windshield did not look like the picture on [the] box."¹³⁵ Where a private individual sues a media defendant for defamation regarding statements of public concern, the Supreme Court has noted that there is "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."¹³⁶

1. Public Concern

To determine whether the statement involved a matter of public concern, the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*¹³⁷ ("*Dun & Bradstreet*") required the Rooney court to examine the statement's content and the context in which it was made by looking at the whole record.¹³⁸ *Dun & Bradstreet* involved an action for defamation brought by a construction contractor against a credit reporting agency which sent false credit reports to the contractor's creditors.¹³⁹ The Supreme Court held that the false statements did not involve a matter of public concern.¹⁴⁰ The credit report was only sent to five subscribers who were not to disseminate the information, and the

131. *Rooney*, 912 F.2d at 1055-56.

132. *Id.* at 1057.

133. *Id.* The court explained that Unelko had to "set forth specific facts showing that there [was] a genuine issue for trial." *Id.* at 1056 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 1057 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

134. *Id.* at 1056.

135. *Id.*

136. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

137. 472 U.S. 749 (1985).

138. *Id.* at 761.

139. *Id.* at 751.

140. *Id.* at 762-63.

subject was only in the interest of the speaker and its specific business audience.¹⁴¹ Therefore, the plaintiff did not have to show actual malice.¹⁴² The *Rooney* court distinguished its case from *Dun & Bradstreet*, finding that Rooney's statement about Rain-X was of general interest and was made available to the general public.¹⁴³

In deciding that the *Rooney* case involved a matter of public concern the court also relied on *Lechuga, Inc. v. Montgomery*¹⁴⁴ ("*Lechuga*"), an Arizona products liability case arising from injuries that the plaintiff sustained while using the defendant's truck. In enunciating the underlying reasons for the strict liability doctrine which would allow the plaintiff to prevail, the court stated that "it is in the public interest to discourage the marketing of defective products."¹⁴⁵ This finding persuaded the court that Rooney's statement involved a matter of public concern.¹⁴⁶ Thus, the burden of proof was on Unelko to prove falsity¹⁴⁷ since "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."¹⁴⁸

2. Proof of Falsity

Since Rooney's statement involved a matter of public concern, the court's determination of summary judgment hinged on whether Unelko made a sufficient showing to the district court that any of Rooney's statements, including his implied factual assertions about Rain-X's performance, were false.¹⁴⁹ The court only examined the evidence which Unelko had offered to challenge Rooney's motion for summary judgment at the district court level.¹⁵⁰ This evidence consisted of:

(1) a comparison of a test performed on Rooney's automobile on June 9, 1988 that revealed no traces of Rain-X and a test performed on a 'control vehicle' that exhibited traces of Rain-X after six months of use and exposure; (2) the deposition testimony of Marguerite Rooney, Rooney's wife, which stated that the windshield Rooney had purportedly just treated with Rain-

141. *Id.* at 762.

142. *Philadelphia Newspapers*, 475 U.S. at 772.

143. *Rooney*, 912 F.2d at 1056.

144. 12 Ariz. App. 32, 467 P.2d 256 (1970).

145. *Id.* at 37, 467 P.2d at 261.

146. *Rooney*, 912 F.2d at 1056.

147. *Id.*

148. *Id.* (quoting *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706 (1990)).

149. *Id.*

150. *Id.* at 1056-57.

X corresponded in appearance to a picture of a windshield without Rain-X on the Rain-X box; and (3) Rooney's deposition testimony, in which he was unable to identify with precision the amount of time he spent applying Rain-X to his automobiles or the exact date on which he used the product.¹⁵¹

The district court's findings persuaded the circuit court that the evidence was inferential and ambiguous and that the summary judgment for Rooney should be affirmed.¹⁵² The testimony by Rooney and his wife showed familiarity with the product and the test evidence failed to show that the control vehicles in Arizona were maintained under the same conditions as Rooney's vehicles in Connecticut.¹⁵³ The court held that a reasonable jury could not find that Unelko met its burden of proving falsity by a preponderance of the evidence.¹⁵⁴ Unelko did not show that traces of Rain-X on Rooney's cars would survive a Connecticut winter and that his discredited testimony was not a sufficient basis for proving falsity.¹⁵⁵

V. CRITICISMS

A. *Misapplication of the Milkovich Standard*

The circuit court reviewed the district court's fact versus opinion distinction and applied the new test of "whether a reasonable factfinder could conclude that the statement 'impl[ies] an assertion of objective fact.'"¹⁵⁶ After deciding that Rooney's statement implied assertions of objective fact, the court undertook a *de novo* review of "whether Unelko met its burden of making a showing of falsity."¹⁵⁷ In doing so, the court

151. *Rooney*, 912 F.2d at 1056-57. For instance, in Rooney's first deposition on May 11, 1988, he testified that he applied Rain-X three weeks to a month before he did the April 17 broadcast. However, after Unelko's June 9 inspection of Rooney's cars, which found no traces of Rain-X, Rooney testified at his deposition on August 10 that "it could have been as early as December." Appellants' Petition for Rehearing and Suggestion for Rehearing En banc at 6, *Rooney*, 912 F.2d 1049 (No. CA 89-15751) (quoting Rooney's deposition).

152. *Rooney*, 912 F.2d at 1057.

153. *Id.*

154. *Id.*

155. *Id.* Ambiguity does not defeat a motion for summary judgment. "[T]he burden of proof is the deciding factor . . . when the evidence is ambiguous [W]here the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech." *Id.* (quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986)).

The court also upheld the dismissal of Unelko's claims for product disparagement (trade libel) and tortious interference with business relationships, since they were subject to the same first amendment requirements as those for a defamation action. *Id.* at 1057-58.

156. *Id.* at 1053 (quoting *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705 (1990)).

157. *Rooney*, 912 F.2d at 1053.

failed to allow Unelko to demonstrate the falsity of the objective facts implied by Rooney's statement.¹⁵⁸

1. The Circuit Court Should Have Remanded the Case to the Trial Court

The circuit court regarded the record as complete. The court went on to apply different legal standards and burdens of proof. As a result, Unelko had no opportunity to address or brief these issues.¹⁵⁹

The court decided that the record was "fully developed"¹⁶⁰ and said it could base its ruling "on any ground finding support in the record."¹⁶¹ Unelko argued that the record had not been fully developed.¹⁶² During the lower court proceedings, Unelko was mid-stream in discovery when the motion for summary judgment was filed.¹⁶³ The issue at hand was whether the statements were fact or opinion. Consequently, Unelko was not given the opportunity to prove its case according to the new standard.

Unelko argued that it was constitutionally entitled to present its case and to develop a factual record in light of the court's introduction of controlling law.¹⁶⁴ The Ninth Circuit has previously held that the dis-

158. Appellants' Petition for Rehearing and Suggestion for Rehearing En banc at 1, *Rooney*, 912 F.2d 1049 (No. CA 89-15751). Robert Cummins, a Chicago attorney who represented Unelko, said that while the appellate court judges were correct in finding Andy Rooney's comments potentially defamatory, the court's analysis of whether his comments were true or false "missed the mark." Cummins asserted that they "did not have an opportunity to develop a record that could be objectively scrutinized." *Wall Street J.*, Aug. 30, 1990, at B8, col. 1.

159. Appellants' Petition for Rehearing and Suggestion for Rehearing En banc at 1, *Rooney*, 912 F.2d 1049 (No. CA 89-15751). The issue confronted by Unelko in responding to Rooney's motion for summary judgment was whether his statements were fact or opinion according to the then controlling law. *Id.* at 8-9. When the Supreme Court reverses the authority upon which a district court relies, "the underpinnings of the district court's decision have been shaken" and the circuit court should remand the proceedings and permit the parties to fully develop the factual record. *Id.* at 8 (quoting *Swistock v. Jones*, 884 F.2d 755, 758 (3d Cir. 1989)).

160. *Rooney*, 912 F.2d at 1053.

161. *Id.* (quoting *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 643 (9th Cir. 1989)).

162. Appellants' Petition for Rehearing and Suggestion for Rehearing En banc at 3, *Rooney*, 912 F.2d 1049 (No. CA 89-15751).

163. *Id.* at 8-9. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding that a court should mandate the entry of summary judgment only if there has been adequate time for discovery).

164. Appellants' Petition for Rehearing and Suggestion for Rehearing En banc at 8, *Rooney*, 912 F.2d 1049 (No. CA 89-15751). The seventh amendment of the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall

strict court should determine whether new evidence is material under a revised legal standard.¹⁶⁵ Consequently, the circuit court should have remanded the proceedings and permitted the parties to fully develop a factual record.¹⁶⁶

2. The Court Failed to Analyze the Assertions Implied by Rooney's Statement

Unelko also argued that this incomplete record was erroneously applied in light of *Milkovich*. Rather than following the holding in *Milkovich* and examining the falsity of Rooney's statement on the basis of objective fact, the court limited its analysis of falsity to what Rooney subjectively stated or meant to say. This contradicted the standard that the court recognized was present in *Milkovich*. The circuit court failed to examine whether Unelko demonstrated, or even had the opportunity to demonstrate, any of the false objective facts implied by Rooney's statements.¹⁶⁷ The court should have examined what a reasonable person would understand Rooney's statement to mean.¹⁶⁸

There were eight factual assertions implied by Rooney's commentary:

- (1) the 'fellow' who makes this sent him the product in care of CBS or '60 Minutes'; (2) for the purpose of receiving a television 'commercial' or 'testimonial'; (3) Rooney spent an *hour* applying Rain-X; (4) to the windshield of one car; (5) he applied it correctly; (6) even though he went through all that ef-

be otherwise re-examined in any court of the United States, then according to the rules of the common law.

U.S. CONST. amend. VII.

165. *United States v. Walgren*, 885 F.2d 1417, 1428 (9th Cir. 1989).

166. *See Swistock v. Jones*, 884 F.2d 755, 758 (3d Cir. 1989). The Arizona Supreme Court has stated:

It is one thing to engage in a constitutionally mandated, independent review of the evidence to see if it supports a verdict which otherwise will stand; it is a different thing, having reversed the verdict for error of law, to determine whether the evidence is sufficient to permit the case to go to trial at all. While the difference may be subtle, the seventh amendment right to a jury trial in federal cases is implicated.

Appellants' Petition for Rehearing and Suggestion for Rehearing En banc at 9, *Rooney*, 912 F.2d 1049 (No. CA 89-15751) (quoting *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 486 n.5, 724 P.2d 562, 572 n.5 (1986)).

167. Appellants' Petition for Rehearing and Suggestion for Rehearing En banc at 3, *Rooney*, 912 F.2d 1049 (No. CA 89-15751).

168. *Id.* "Precluding a plaintiff from recovering for defamation that is cleverly couched in implication is inequitable. It rewards a defendant for having the foresight or literary facility to secrete a 'classic and coolly crafted libel' in the overtones of a facially neutral statement." Note, *The Art of Insinuation: Defamation by Implication*, 58 *FORDHAM L. REV.* 677, 701 (1990) (quoting *Ollman v. Evans*, 750 F.2d 970, 1036 (D.C. Cir. 1984) (Scalia, J., dissenting), *cert. denied*, 471 U.S. 1127 (1985)).

fort, it didn't work, and therefore (7) Rain-X is 'junk,' and (8) the manufacturer is dishonest for representing otherwise.¹⁶⁹

Unelko presented evidence that each of these assertions were false and misleading.¹⁷⁰ First, the Rain-X was sent to Andy Rooney in care of the *Chicago Tribune* for his personal use in response to his article about rain.¹⁷¹ It was not sent for a commercial endorsement.¹⁷² Second, Rooney confessed that he did not spend the entire hour applying Rain-X to the windshield on his car and he contradicted his own testimony regarding the cars he allegedly treated.¹⁷³ Instead of examining the meaning which reasonable viewers could glean from Rooney's statement, the court substituted Rooney's own subjective interpretation:

For the purposes of analyzing Unelko's showing of falsity, we assume that Rooney's statement 'It didn't work' implied the following factual assertions about Rain-X's performance, which Rooney made at his deposition — that it 'hazed over when the windshield wiper went one way and tended to smear,' that it caused his windshield to be 'splotchy,' and that the 'windshield did not look like the picture on [the] box.'¹⁷⁴

However, the average viewer would not be aware of Rooney's deposition testimony. Under the *Milkovich* rule, the statement's implications would not be so limited. The court failed to address the underlying facts when it affirmed Rooney's motion for summary judgment.

B. Inappropriate Analysis Regarding the Issue of Public Concern

Even if the statements at issue are susceptible of being proven true or false, the *Milkovich* Court noted that for statements of public concern the plaintiff has the burden of proving their falsity before a state's libel laws can be applied.¹⁷⁵ The Court relied on *Philadelphia Newspapers*, which held "that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media de-

169. Appellants' Petition for Rehearing and Suggestion for Rehearing En banc at 5, *Rooney*, 912 F.2d 1049 (No. CA 89-15751).

170. *Id.* at 5-8.

171. *Id.* at 5.

172. *Id.*

173. *Id.* at 5-6. At Rooney's first deposition, he said that he spent an hour washing his BMW and his wife's Saab, and then applied Rain-X to all the windows of both cars. Then he changed his testimony and testified that the Rain-X was applied to all of the windows of a BMW and a Ford, but *not* to his wife's Saab. Rooney further impeached his testimony concerning the issue of when he allegedly applied Rain-X. *Id.*

174. *Rooney*, 912 F.2d at 1056.

175. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2707 (1990).

fendant for speech of *public concern*.”¹⁷⁶ Absent a finding of public concern, the burden of proving falsity imposed by *Philadelphia Newspapers* would not apply.¹⁷⁷ Therefore, Unelko would prevail under the *Milkovich* test for a constitutional privilege, which would override the state’s interest in protecting private plaintiffs from defamatory statements. Arizona’s libel laws would now control since “so long as they do not impose liability without fault, the [s]tates may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”¹⁷⁸ Under Arizona law, Unelko would only have had to show that Andy Rooney and CBS were negligent by a preponderance of the evidence.¹⁷⁹ It appears that under this standard, Unelko had sufficient evidence to withstand Rooney’s motion for summary judgment. Therefore, this unitary finding by the circuit court of public concern was clearly detrimental to the plaintiff.

The Ninth Circuit concluded that Rooney’s statements involved a matter of public concern but Unelko was not allowed to brief and develop a record with respect to the issue of public concern.¹⁸⁰ The Ninth Circuit erroneously addressed this issue because it was not previously addressed by the District Court.¹⁸¹ The court focused on Rooney rather than the subject matter.¹⁸²

The case upon which the Ninth Circuit relied in determining that

176. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (emphasis added).

177. The *Rooney* court referred to Unelko as a “private individual.” *Rooney*, 912 F.2d at 1056.

178. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

179. *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1977). The *Peagler* court held that the Arizona standard for defamation of a private person was negligence, stating that “[t]he question which the jury must determine from the preponderance of the evidence is whether the defendants acted reasonably in attempting to discover the truth or falsity of the defamatory character of the publication.” *Id.* (citations omitted).

180. Appellants’ Petition for Rehearing and Suggestion for Rehearing En banc at 12, *Rooney*, 912 F.2d 1049 (No. CA 89-15751). This is not an easily answered issue, because the Supreme Court has not enunciated a bright-line test for characterizing matters of public concern as opposed to private matters. “Instead, the court has loosely defined speech concerning public matters as ‘relating to any matter of political, social, or other concern to the community,’” Note, *Philadelphia Newspapers v. Hepps Revisited: A Critical Approach to Different Standards of Protection for Media and Nonmedia Defendants in Private Plaintiff Defamation Cases*, 58 GEO. WASH. L. REV. 1268, 1275 (1990) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

181. When the Supreme Court reverses the authority upon which the district court relied, “the underpinnings of the district court’s decision is shaken” and the circuit court should remand the proceedings and permit the parties to fully develop the factual record. *Swistock v. Jones*, 884 F.2d 755, 758 (3d Cir. 1989).

182. Appellants’ Petition for Rehearing and Suggestion for Rehearing En banc at 14 n.20, *Rooney*, 912 F.2d 1049 (No. CA 89-15751).

the matter was one of public concern was not applicable because the case did not involve the first amendment.¹⁸³ Instead of being premised on federal constitutional principle, the action was based on state tort law. To support its finding, the Ninth Circuit seized upon the assertion in *Lechuga* that "[i]t is in the public interest to place responsibility for injury upon the manufacturer who was responsible for its reaching the market."¹⁸⁴ The concurring opinion in *Lechuga* used this assertion in the context of placing responsibility upon the manufacturer of a defective product for compensating consumers who are injured.¹⁸⁵ Public interest in the context of product liability is a completely different issue than the issue of public concern for purposes of protection of a product manufacturer like Unelko who is defamed by the media without basis.

VI. SIGNIFICANCE AND IMPLICATIONS OF THE CASE

Libel law attempts to balance two competing policies important in our society. On the one hand, there is the first amendment guarantee of freedom of speech.¹⁸⁶ Public discourse is valued for its dissemination of ideas and information. Public debate aids the discovery of truth and enables all citizens to participate in decision-making, while free expression helps to assure self-fulfillment.¹⁸⁷ On the other hand, there is a personal interest in protecting one's reputation by providing redress for harm and vindication of reputation.¹⁸⁸ The Supreme Court has recognized "important social values which underlie the law of defamation," and that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation."¹⁸⁹ As Justice Stewart asserted in *Ro-*

183. *Lechuga, Inc. v. Montgomery*, 12 Ariz. App. 32, 33, 467 P.2d 255, 257 (1970). *Lechuga* did not address a first amendment issue. Rather, the issue was whether strict liability should be applied in a tort action involving an allegedly defective product. *Id.*

184. *Id.* at 37, 467 P.2d at 261 (Jacobson, J., concurring).

185. *Id.*

186. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

187. Note, *supra* note 41, at 787-88.

188. "In Shakespeare's *Othello*, Iago says to Othello:

'Good name in man and woman, dear my lord.
Is the immediate jewel of their souls.
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.' Act III, scene 3."

Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2702 (9th Cir. 1990).

189. *Milkovich*, 110 S. Ct. at 2707-08 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

senblatt v. Baer:¹⁹⁰

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.

....

... The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.¹⁹¹

Rulings with certainty and clarity are of utmost importance in the area of free speech to ensure not only that plaintiffs obtain redress, but also so that the media is protected from the chilling effect of an elusive standard.¹⁹² Society's interest in an open forum for debate of issues is neither served by careless mistakes nor by lies.¹⁹³

After the *Gertz* fact versus opinion distinction, considerable controversy arose as to what statements were actionable.¹⁹⁴ Many argued that private citizens would be stripped of all redress since it was relatively simple to persuade the courts that a statement was merely opinion. Chief Justice Rehnquist noted that "[l]ower courts have seized upon the word 'opinion' [in *Gertz*] . . . to solve with a meat axe a very subtle and difficult question, totally oblivious 'of the rich and complex history of the struggle of the common law to deal with this problem.'"¹⁹⁵

190. 383 U.S. 75 (1966).

191. *Id.* at 92-93 (Stewart, J. concurring). An attorney who represented a Miss Wyoming in a defamation suit against Penthouse lamented the difficulty in vindicating one's reputation in the current courts:

Many years ago when I went to law school there was a simple axiom that shed hope on that otherwise dreary experience: 'Where there is a wrong, there is a remedy.' But that was before the great shifting of values had so tilted the country that we all slid down that slithery slope into the great green abyss where money and profit are everything and God is Mammon. Those were the 'olden days' when the rights of people came first and when juries, not distant judges fluttering on celestial thrones, decided our cases.

Spence, *The Sale of the First Amendment*, A.B.A. J., Mar. 1989, at 52.

192. "Uncertainty as to the scope of the constitutional protection can only dissuade protected speech - the more elusive the standard, the less protection it affords." *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2695 (1989).

193. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974).

194. See *supra* text accompanying notes 77-87.

195. *Ollman v. Evans*, 471 U.S. 1127, 1129 (1985) (dissenting from denial of petition for writ of certiorari) (quoting Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1239 (1986)).

Now that the Supreme Court has attempted to resolve this problem, the remedy's effect will be determined by its application by the lower courts.¹⁹⁶ As the first circuit court to interpret the new *Milkovich* rule, the Ninth Circuit has defeated the rule's purpose by applying it in an arbitrary way. Thus, the rule may follow the path of the old opinion privilege, with the courts deciding cases which serve "merely [as] 'compasses,' not 'maps,' adding little predictability to the privilege."¹⁹⁷

VII. CONCLUSION

Because the fact versus opinion distinction was so hazy, the Supreme Court sought to clarify defamation rulings through its *Milkovich* decision.¹⁹⁸ The lower courts had been defining the distinction in many different ways.¹⁹⁹ In *Rooney*, instead of taking advantage of the Supreme Court's clarification, the Ninth Circuit obtained the decision it wanted via an arbitrary application of the rule.²⁰⁰ The court ruled in favor of Rooney, a media defendant, seemingly protecting first amendment rights and encouraging wide open debate. In reality, this ruling will inhibit public discourse because arbitrary application of rules promotes uncertainty. If members of the media are uncertain whether or not their statements are actionable, they will tend to inhibit their speech — the proverbial "chilling effect." This is an unfortunate first interpretation of a landmark decision in libel law.

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196. *Milkovich* clearly seems designed to bring about a sea of change in the way lower courts analyze opinion issues. But it remains to be seen what its real impact will be.

As torts such as defamation, disparagement and injurious falsehood are creatures of state law, *Milkovich's* importance will depend in large part upon its reception in state appellate courts.

Clayton, *High Court: No Federal Privilege for Opinion*, THE NAT'L L. J., Aug. 27, 1990, at 27.

197. Note, *The Illusion of the Fact-Opinion Distinction in Defamation Law*, 39 CASE W. RES. L. REV. 867, 893 (1989) (footnote omitted).

198. See Note, *supra* note 168, at 690 (The Supreme Court agreed to hear *Milkovich* because it recognized that the lower court tests for distinguishing fact from opinion "spawn[ed] inconsistency.").

199. See *supra* text accompanying notes 77-87.

200. "Some commentators [before the *Milkovich* decision] suggest[ed] juries in libel cases may really be trying the popularity of the statement at issue. However, similar problems can arise with judges." Note, *supra* note 197, at 894 (footnote omitted).

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