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Constitutional Law - Freedom of Speech: Defamation - You Better Smile When You Call Me an Asshole - Freedom of Speech in Wyoming after Milkovich - Spence v. Flynt

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CASENOTES

CONSTITUTIONAL LAW—Freedom of Speech: Defamation— You Better Smile When You Call Me an Asshole! Freedom of Speech in Wyoming After *Milkovich*. *Spence v. Flynt*, 816 P.2d 771 (Wyo. 1991).

The July 1985 issue of *Hustler* magazine named Gerry Spence (Spence), arguably one of America's most prominent and colorful lawyers,¹ "Asshole of the Month."² *Hustler* bestowed the dubious distinction upon Spence because he represented Andrea Dworkin in anti-pornography litigation against *Hustler*.³ An article, appearing on the monthly "Bits and Pieces" editorial page,⁴ characterized Spence as one of a group of "shameless shitholes," "hemorrhoidal types," "parasitic scum-suckers," "vermin-infested turd dispensers," known as lawyers.⁵ *Hustler* claimed that lawyers "are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets."⁶

1. *Spence v. Flynt*, 816 P.2d 771, 788 (Wyo. 1991) (Golden, J., concurring in part and dissenting in part), *cert. denied*, 60 U.S.L.W. 3713 (U.S. April 21, 1992) (No. 91-1213). Spence has handled many highly publicized lawsuits including the "Miss Wyoming" case, *Pring v. Penthouse Magazine*, 695 F.2d 438 (10th Cir. 1982), *cert. denied* 462 U.S. 1132 (1983), and the Karen Silkwood case, *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984).

2. *Spence*, 816 P.2d at 772.

3. Andrea Dworkin, an outspoken feminist, brought an antipornography suit against *Hustler*. *Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408 (C. D. Cal. 1987), *aff'd*, 867 F.2d 1188 (9th Cir. 1989), *cert. denied*, 493 U.S. 812 (1989).

4. *Spence*, 816 P.2d at 786 (Golden, J., concurring in part and dissenting in part).

5. HUSTLER, July 1985.

6. *Id.* The article appearing in *Hustler's* July 1985 edition reads:

Many of the vermin infested turd dispensers we name Asshole of the Month are members of that group of parasitic scum-suckers often referred to as lawyers. These shameless shitholes (whose main allegiance is to money) are eager to sell out their personal values, truths, justice and our hard-won freedoms for a chance to fatten their wallets. The latest of these hemorrhoidal types to make this page is Jackson, Wyoming, attorney Gerry Spence, our Asshole of the Month for July. Spence dudes himself up in western duds and calls himself a "country lawyer," but the log-cabin image is as phony as a cum-dripping whore's claim of virginity. This reeking rectum is worth millions and owns a 35,000 acre ranch. Spence's claim to fame is that in the name of "the little guy" he's won some mighty big judgments against some mighty big corporations: \$10.5 million against Kerr-McGee (the famous Karen Silkwood case), \$26.6 million against *Penthouse*, and \$52 million against McDonald's. He'd like to add HUSTLER to the list . . . for a whopping \$150 million. His client is "little guy" militant lesbian feminist Andrea Dworkin, a shit-squeezing sphincter in her own right. In her latest publicity-grab, Dworkin has decided to sue HUSTLER for invasion of privacy among other things.

Dworkin seems to be an odd bedfellow for "just folks," "family values" Spence. After all, Dworkin is one of the most foul-mouthed, abrasive manhaters on Earth. In fact, when Indianapolis contemplated an antiporn ordinance co-authored by Dworkin, she was asked by its supporters to stay away for fear her repulsive pres-

The article also attacked Spence directly. *Hustler* claimed Spence's "log-cabin image is as phony as a cum-dripping whore's claim of virginity."⁷ *Hustler* stated that Spence had sold out his professed traditional family values by representing Dworkin, whom *Hustler* dubbed as an advocate of bestiality, incest and sex with children.⁸

Spence sued *Hustler* magazine, publisher Larry Flynt, and others,⁹ in Teton County District Court in Jackson, Wyoming, claiming that *Hustler's* article defamed him. *Hustler* claimed that First Amendment free speech rights protected the article from Spence's defamation claims. In granting summary judgment in favor of *Hustler*,¹⁰ the court followed well-established precedent.¹¹ The court held that *Hustler's* article was nonactionable editorial opinion which enjoyed absolute protection under the First Amendment of the United States Constitution.¹²

ence would kill the statute. Spence, however, can demand as much as 50% of the take from his cases. And a possible \$75 million would buy a lot of country for this lawyer. Considering that Dworkin advocates bestiality, incest and sex with children, it appears Gerry "This Tongue for Hire" Spence is more interested in promoting his bank account than the traditional values he'd like us to believe he cherishes.

This case is a nuisance suit initiated by Dworkin, a cry-baby who can dish out criticism but clearly can't take it. The real issue is freedom of speech, something we believe even Dworkin is entitled to, but which she would deny to anyone who doesn't share her views. Any attack on First Amendment freedoms is harmful to us all . . . Spence's foaming-at-the-mouth client especially. You'd think someone of Spence's stature would know better than to team up with a censor like Dworkin. Obviously, the putrid amber spray of diarrhea known as *greed* has clouded this Asshole's senses.

Id. (emphasis in original)

7. *Spence*, 816 P.2d at 786 (Golden, J., concurring in part and dissenting in part).

8. *Id.*

9. *Id.* Actual named parties are listed as follows: Gerry L. Spence and the Spence Foundation for People's Attorneys Inc., v. Larry Flynt; Althea Flynt; L.F.P., Inc., a California corporation; Larry Flynt Publications; *Hustler Magazine, Inc.*, a California corporation; Flynt Distributing Company, a California corporation; Flynt Subscription Company, a Nevada corporation; LFZ, LTD., a B.W.I. corporation; Island Distributing, Inc., a B.W.I. corporation; David Kahn; Jim Goode, Doug Oliver; N. Morgan Hagan; Lonn M. Friend; Inland Empire Periodicals, an Oregon corporation; and Park Place Market, Inc., a Wyoming corporation.

10. *Id.* at 772.

11. Benjamin D. Scheibe, *The Constitutional Defense of Opinion: The Impact of the Milkovich Decision*, LOS ANGELES LAWYER, April 1991 at 36.

It came to be taken for granted that a statement of opinion was absolutely privileged and could not serve as the basis for a defamation action. The defense appeared to become firmly ensconced in the law of the federal judiciary and the various states . . . defendants often were able to obtain summary judgment or otherwise avoid the risks and the expenses inherent in a jury trial through the invocation of the defense.

See also, Harvard Law Review Association, *I. Constitutional Law; D. Freedom of Speech, Press, and Association; 2. Libel Law—Opinion Privilege*, 104 HARV. L. REV. 219, (Nov. 1990).

12. *Spence*, 816 P.2d at 783 (Golden, J., concurring in part and dissenting in part).

On appeal, the Wyoming Supreme Court reversed the grant of summary judgment noting that, in light of the United States Supreme Court decision in *Milkovich v. Lorain Journal*,¹³ the United States Constitution did not contain an absolute protection of opinion in defamation claims.¹⁴ The court further held that the publication of an opinion may be actionable regardless of whether it contains an actual or implied assertion of fact.¹⁵ In addition, the court stated that *Hustler's* comments were clearly defamatory, and unless they were protected criticisms of a public figure, the statements were actionable.¹⁶ Finally, the court remanded for a jury determination of whether public or private figure analysis should be used in Spence's defamation claim, even after Spence admitted his public figure status.¹⁷

This casenote addresses the appropriate standard of review to be applied in defamation cases brought by public figures. It commends the Wyoming Supreme Court for taking steps to protect individuals from personal attack while considering strong First Amendment free speech guarantees. However, the casenote concludes that the Wyoming Supreme Court erroneously interpreted the *Milkovich* decision, disregarding over a quarter of a century of common law First Amendment application. Finally, the casenote suggests a more expedient interpretation of the *Milkovich* decision and evaluates *Spence* using the standards actually set forth in *Milkovich*.

BACKGROUND

Historically, defamation law developed to vindicate the damage done to a person's reputation by the publishing of false and damning statements.¹⁸ Clearing a person's good name led to obtaining damage judgments for the harm to that individual's business due to the defamatory statements.¹⁹ Courts have continually had the difficult task of refining defamation laws in the face of the ever-strengthening First Amendment freedom of speech, especially through the red scare of the 1940s and 1950s and the civil rights movement of the 1960s.²⁰

One of the earliest challenges to First Amendment freedom of speech occurred in *Chaplinski v. New Hampshire*.²¹ In *Chaplinski*, a

13. 110 S. Ct. 2695 (1990).

14. *Spence*, 816 P.2d at 775.

15. *Id.* at 776.

16. *Id.* Where a public figure is concerned, defamation not only requires a false statement tending to hurt the plaintiff's reputation, but also a finding of malice (either knowledge of falsity of the statement or a reckless disregard for the truth). A showing of negligence is enough to support a defamation claim if the plaintiff is considered a private individual. See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

17. *Spence*, 816 P.2d at 777.

18. W. Prosser, D. Dobbs, R. Keaton, & D. Owen, *On the Law of Torts*, § 111 (5th ed. 1984).

19. *Id.*

20. See cases cited *infra* notes 26, 35, 38.

21. 315 U.S. 568 (1942).

Jehovah's Witness was convicted under a New Hampshire statute for calling the City Marshall of Rochester a "God damned racketeer" and "a damned Fascist."²² The appellant questioned the constitutionality of the statute claiming it was an infringement on his First Amendment freedom of speech.²³ The challenged provision of the statute related to words or names addressed to another person in a public place.²⁴ The United States Supreme Court affirmed the appellant's conviction, holding that the statute was constitutional because it did "no more than prohibit the face-to-face words plainly likely to cause a breach of peace by the addressee . . . including 'classical fighting words,' words . . . equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."²⁵

The first landmark case of the modern era dealing with the defamation of a public figure arose from the civil rights movement in the 1960s. In *New York Times Co. v. Sullivan*,²⁶ a police commissioner claimed that certain derogatory statements printed in the *New York Times* referred to him. The statements were contained in a political advertisement endorsing civil rights demonstrations and condemning local law enforcement officers for their actions.²⁷

The United States Supreme Court held that the First Amendment to the United States Constitution limited application of state defamation laws.²⁸ The Court stated that a defendant would escape liability for defamatory statements unless the plaintiff could prove "actual malice."²⁹ Actual malice was defined as a statement made "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not."³⁰ However, this test was limited to public officials in their conduct of governmental affairs.³¹

In *New York Times*, the Court found that the newspaper was unaware that what it had printed was false.³² The newspaper had no reason to doubt reliable sources and therefore had no reckless disregard for the truth.³³ The Court ruled that to compel a critic to guaran-

22. *Id.* at 569.

23. *Id.*

24. *Id.* at 572. Public Laws of New Hampshire at that time prohibited a person from addressing "any offensive, derisive or annoying word to any person who is lawfully in any street or other public place . . . [or] call him by any offensive or derisive name." *Id.* at 568.

25. *Id.* at 573. "Fighting words" are words said in a face-to-face confrontation which create a clear and present danger that violence will occur. States have a compelling interest in keeping the peace between their citizens. For that reason, "fighting words" are not protected by the First Amendment. *Id.*

26. 376 U.S. 254 (1964).

27. *Id.*

28. *Id.*

29. *Id.* at 279-80.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 278.

tee the truthfulness of all of his/her factual assertions would lead to "self-censorship" which could chill the most basic freedom of speech, the right to criticize the government.³⁴

Three years later in *Curtis Publishing Co. v. Butts*,³⁵ the Court expanded the *New York Times* test to apply to any public figure as long as the statement in question concerned an issue of public interest. Coach Wally Butts of the University of Georgia brought suit against the *Saturday Evening Post* over an article which accused Butts of conspiring to fix football games with Alabama coach Paul "Bear" Bryant.³⁶ The United States Supreme Court further extended the *New York Times* test beyond public officials to anyone intimately involved in the resolution of important public questions, or anyone who, by reason of his/her fame, shaped events in "areas of concern to society at large."³⁷

In the 1970s, the United States Supreme Court established an absolute defense to defamation claims brought by public figures. In the dicta of *Gertz v. Robert Welch, Inc.*,³⁸ the Court set forth the absolute defense of opinion in printed material. In *Gertz*, an attorney sued a magazine publisher for printing an article accusing him of creating a Communist conspiracy against the Chicago police department. Although decided on an entirely different issue,³⁹ the court in *Gertz* stated that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of the judges and juries but on the competition of other ideas."⁴⁰ Subsequently, courts cited *Gertz* for the proposition that opinion is absolutely privileged and cannot serve as the basis for a defamation claim.⁴¹ Following *Gertz*, the absolute defense of opinion was applied widely in federal and state courts throughout the country.⁴² This defense protected many statements which were previously actionable.⁴³ However, in applying the *Gertz* absolute opinion defense, courts have had difficulty distinguishing be-

34. *Id.*

35. 388 U.S. 130 (1967).

36. *See Id.*

37. *Id.* at 164.

38. 418 U.S. 323 (1974).

39. *Id.* at 351-52. *Gertz* was decided on the grounds that the person defamed was not a public figure. Statements regarding private individuals are given less First Amendment protection. *Id.*

40. *Id.* at 340-41.

41. *See supra* note 11.

42. Statements found to be protected opinion have included references to William F. Buckley as a "facist," *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); references to a lawyer as "sleazy," *Catalfo v. Jensen*, 657 F. Supp. 463 (D.N.J. 1987); descriptions of a co-worker as a "raving maniac," *De Moya v. Walsh*, 441 So. 2d 1120 (Fla. App. 1983); allegations that a professional boxing match was fixed, *Don King Prod., Inc. v. Douglas*, 742 F. Supp. 778 (S.D.N.Y. 1990); and, referring to a news reporter as "the only newscaster in town . . . enrolled in a course for remedial speaking," *Meyers v. Boston Magazine*, 403 N.E.2d 376 (Mass. 1980).

43. *See supra* note 42.

tween fact and opinion.⁴⁴

Ten years after *Gertz* was decided, the District of Columbia Circuit Court of Appeals set forth the following four-part test for determining whether a statement is fact or opinion:⁴⁵

1. The court would first look at the specific language used;⁴⁶
2. next, the court would determine whether the statement was verifiable;⁴⁷
3. then, the court would look at the general context of the statement;⁴⁸ and,
4. finally, the court would take into consideration the broader context in which the statement appeared.⁴⁹

All four steps would be considered to determine whether, under the totality of the circumstances, a statement is fact or opinion.⁵⁰

The most widely publicized application of the *Ollman* test occurred in *Hustler v. Falwell*.⁵¹ After applying the test the Court added that if, in viewing the totality of the circumstances, a reasonable person would not believe the statements to be true, then the Court would consider the objectionable statements non-actionable.⁵² The reasonable person standard applied even when the facts stated were probably false.⁵³

44. See, e.g., *Ollman v. Evans*, 750 F.2d 970 (1984), cert. denied, 471 U.S. 1127 (1985); *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970).

45. See *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984).

46. *Id.* at 978. For example, to call someone a stock market analyst is an assertion of fact by definition. To say someone is a bad stock market analyst is opinion by the very language. See *Roffman v. Trump*, 754 F. Supp. 411 (E.D. Pa. 1990).

47. *Ollman*, 750 F.2d at 978. For example, to say that Mike Tyson knocked out Buster Douglas in the eighth round of a championship fight but was not awarded a knock out because the referee's count lasted longer than boxing rules provide can be easily verified by looking at the videotape of the fight. See *Don King Prod., Inc. v. Douglas*, 742 F. Supp. 778 (S.D.N.Y. 1990).

48. *Ollman*, 750 F.2d at 978. For example, the general context of Andy Rooney complaining about everything on the television program *60 Minutes* would tend to dismiss Mr. Rooney's statements as opinion. See *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990).

49. *Ollman*, 750 F.2d 978. For example, the broad social context of lambasting the umpire at a baseball game would dismiss most disparaging remarks made to an umpire by a team owner. *Spence v. Flynt*, 816 P.2d 771, 788 (Golden, J., concurring in part and dissenting in part) (citing *Parks v. Steinbrenner*, 520 N.Y.S.2d 374 (1987)).

50. See *Ollman*, 750 F.2d 970 (1984).

51. 485 U.S. 46 (1988). *Falwell* is a recent case in a long line of cases which protect rhetorical hyperbole. In *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6 (1970), the characterization of a developer's negotiating position as "blackmail," was rhetorical hyperbole (a vigorous epithet used by those who considered the developer's position very unreasonable). In *Letter Carriers v. Austin*, 418 U.S. 264 (1974), the word "traitor" describing a union "scab" was considered rhetorical hyperbole (a lusty and imaginative expression of contempt). The three decisions together are commonly referred to as the *Bresler/Letter Carrier/Falwell* line of cases.

52. *Falwell*, 485 U.S. 46, 50 (1988).

53. *Id.*

In *Falwell, Hustler* published an advertising parody showing Jerry Falwell, a famous televangelist, having his first sexual relations with his mother in an outhouse.⁵⁴ The Court found that, in the overall setting, no reasonable person would conclude that *Hustler* intended for the statements to be believed as true. The Court held the parody to be an example of protected "imaginative expression" and "rhetorical hyperbole."⁵⁵

In 1990, the United States Supreme Court held that no constitutionally-protected absolute privilege of opinion exists in defamation cases.⁵⁶ *Milkovich v. Lorain Journal* involved a defamation action in which a wrestling coach sued a local paper and reporter for statements arising from a brawl which happened during a high school wrestling match. At a hearing to determine who was at fault, the coach denied any culpability on the part of his school. After the team and school were exonerated, a local newspaper printed an article which stated that the coach's school "beat the law with the 'big lie.'"⁵⁷ The news reporter implied that the coach had perjured himself under oath.⁵⁸ The Ohio Supreme Court dismissed the case, finding that the entire newspaper column was constitutionally-protected opinion.⁵⁹

The United States Supreme Court reversed the decision.⁶⁰ In doing so, the Court noted the dicta in *Gertz*, indicating that "there is no such thing as a false idea."⁶¹ However, the Court went on to explain that this rationale did not create an absolute opinion defense:

We do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion" . . . Not only would such an interpretation be

54. *Id.*

55. *Id.* Rhetorical hyperbole was defined as a vigorous epithet used by those who would consider their opponent's negotiating position extremely unreasonable. For whatever that is worth, the phrases "rhetorical hyperbole" and "imaginative expression" sprang from Holmes' famous marketplace of ideas theory. See *Towne v. Eisner*, 245 U.S. 418 (1918). Any comment that did not actually harm the other person fell under these categories. Vulgarities, abusive epithets, and profanities are classified as rhetorical hyperbole and are nonactionable. R. Smolla, *Law of Defamation*, §§ 4.03, 6.12[10] (1989).

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

57. *Id.* at 2698.

58. *Id.*

59. *Milkovich v. News-Herald*, 545 N.E.2d 1320 (Ohio Ct. App. 1989) (There had been a long line of cases that led to the final disposition in *Milkovich v. Lorain Journal*, 110 S. Ct. 2695 (1990). In addition to *Milkovich*, the news article also named the superintendent of schools (Scott). Scott filed a separate defamation action against the newspaper. The Ohio Supreme Court first decided *Milkovich v. News-Herald*, 473 N.E.2d 1191 (Ohio 1984), holding that the article was defamatory. Meanwhile, Scott had been pursuing his claim and the court reversed its opinion on the article, concluding that it was "constitutionally-protected opinion." *Scott v. News-Herald*, 496 N.E.2d 699, 709 (Ohio 1986). The Ohio Court of Appeals in the instant proceeding, considering itself bound by *Scott* concluded that, as a matter of law, "the article was constitutionally protected opinion." *Milkovich*, 545 N.E.2d at 1324.)

60. *Milkovich*, 110 S. Ct. 2695 (1990).

61. *Id.* at 2700.

contrary to the tenor and context of the passage, but it would also ignore the fact that the expressions of "opinion" may often imply an assertion of objective fact.⁶²

No longer needing to distinguish fact from opinion, the Supreme Court rejected the *Ollman* test and developed a new test for defamation claims.⁶³ The Court determined that statements which are demonstrably false and capable of being construed as assertions of fact are defamatory.⁶⁴ Also, the Court made clear its approval of the *Bresler/Letter Carriers/Falwell* line of cases: "[Those cases] provide protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual. This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation."⁶⁵

The Court left for future resolution the exact manner in which the *Milkovich* standard will be applied in state courts. In *Spence v. Flynt*, the Wyoming Supreme Court's application of the *Milkovich* standard is not only confusing, it is clearly erroneous.

How Other States Have Interpreted Milkovich

Since *Milkovich*, legal publications nationwide have proclaimed the end of the well-established rule that an opinion could not be the basis for a defamation suit.⁶⁶ However, commentators have suggested that the substance of the opinion defense may still exist in state courts which previously invoked the defense on a liberal basis.⁶⁷ Some have anticipated that rather than presenting a "circumscription of the defenses available," *Milkovich* will be more significant in "clarifying the appropriate constitutional analysis to be applied in a defamation action."⁶⁸

This prophesy has come to pass in many state courts. In *Dodson v. Dicker*,⁶⁹ the Arkansas Supreme Court ruled that: "The threshold question in defamation actions is not whether a statement could be considered an 'opinion,' but rather whether a reasonable fact-finder could conclude that the statement implies an assertion of an objective,

62. *Id.* at 2705.

63. *Id.* at 2700-01. The long-established theory that the United States Constitution specifically protected opinion in defamation actions was eliminated. *Milkovich* did not ban opinion defenses from being used. It merely stated that the Constitution did not impliedly provide this defense. *Id.* at 2707.

64. *Id.* at 2707.

65. *Id.* at 2706.

66. Benjamin D. Schiebe, *The Constitutional Defense of Opinion: The Impact of the Milkovich Decision*, LOS ANGELES LAWYER, April 1991 at 36.

67. *Id.*

68. *Id.* at 64.

69. 812 S.W.2d 97 (Ark. 1991).

verifiable fact.”⁷⁰ In *Dodson*, a therapist accused the president of the State Board of Therapy Technicians of rewriting a licensing test for profit and accused the president’s husband of being a “sneaky bully.”⁷¹ The Arkansas court, applying the new standards from *Milkovich*, held that neither statement was an “assertion of objective facts” which would be actionable.⁷²

In *Flip Side, Inc. v. Chicago Tribune*,⁷³ a record company sued the *Chicago Tribune* and the writers and artists of the episodic comic strip “Dick Tracy.” The comic strip ran a six-month story line about a record company called Flipside, Inc., which supposedly was involved in organized crime, payola, and murder.⁷⁴ The Illinois Court of Appeals, citing *Milkovich*, held that:

A communication is considered defamatory if it tends 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. The communication, however, must be reasonably understood to be a false communication of fact about the plaintiff Only statements that are capable of being proved false are subject to liability⁷⁵

The court found that the comic strip did not reasonably imply any statements of fact about the plaintiff, and it therefore was constitutionally protected.⁷⁶

In *Lund v. Chicago and Northwestern Transportation Co.*,⁷⁷ an employee’s name appeared in a memorandum from management on the same line as the words “favoritism,” “brown nose,” and “shit heads.”⁷⁸ The Minnesota Court of Appeals held that the terms “favoritism” and “brown nose” were too vague and ambiguous, preventing them from being proved true or false.⁷⁹ The court also ruled that although “shit heads” was uncomplimentary, it did not suggest verifiably false facts about Lund.⁸⁰

In *Lester v. Powers*,⁸¹ a college student submitted a letter to the university tenure committee, accusing a professor of being homophobic, offensive, insensitive, and intimidating.⁸² The Supreme Court of Maine held that the statements were mere observations, not

70. *Id.* at 98.

71. *Id.*

72. *Id.* at 99.

73. 564 N.E.2d 1244 (Ill. 1990).

74. *Id.*

75. *Id.* at 1252.

76. *Id.* at 1253.

77. 467 N.W.2d 366 (Minn. App. 1991).

78. 467 N.W.2d 366, 369 (Minn. App. 1991).

79. *Id.* at 369.

80. *Id.*

81. 596 A.2d 65 (Me. 1991).

82. *Id.* at 71.

statements of fact.⁸³ Citing *Milkovich*, the court ruled that the statements were protected opinion unless “provably false, and capable of being reasonably interpreted as making or implying false and defamatory statements concerning actual facts.”⁸⁴

Finally, in *Immuno A.G. v. Moor-Jankowski*,⁸⁵ the editor of a scientific journal questioned the motivation of a biologic products manufacturer in establishing a hepatitis research facility.⁸⁶ The editor claimed the manufacturer was setting up the facility in West Africa to avoid international policies or legal restrictions on the importation of chimpanzees, an endangered species which was to be used in the drug testing.⁸⁷ The New York Court of Appeals analyzed *Milkovich* and held that the key inquiry in a defamation suit was whether the statement would reasonably appear to state or imply assertions of objective fact.⁸⁸ The court examined the statements and found that the manufacturer had not raised a triable issue as to the falsity of the assertions of fact.⁸⁹

PRINCIPAL CASE

In *Spence v. Flynt*,⁹⁰ the Wyoming Supreme Court could not decide on the standard to be used in determining whether statements are actionable in defamation suits. The plurality of the court⁹¹ interpreted the 1942 United States Supreme Court’s decision in *Chaplinski v. New Hampshire* as holding that insults and profane speech, among other things, are not constitutionally protected.⁹²

The Wyoming Supreme Court ruled that an individual should be

83. *Id.*

84. *Id.*

85. 567 N.E.2d 1270 (N.Y. App. 1991).

86. *Id.* at 1273-74.

87. *Id.*

88. *Id.*

89. *Id.*

90. 816 P.2d 771 (Wyo. 1991).

91. *Id.* The plurality opinion was written by Justice Cardine and joined by Justice Urbigkit. Justice Thomas specially concurred. Justice Macy concurred in the reversal of summary judgment but dissented in the plurality’s reasoning. Justice Golden dissented in the plurality’s reasoning and concurred on separate issues not discussed in this casenote. *Id.*

92. *Id.* at 774 (citing *Chaplinski v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

Id.

entitled to bring an action for the exact kind of "grossly defamatory" statements to which *Hustler* subjected Spence.⁹³ The plurality also relied heavily on *Milkovich*, stating that the United States Supreme Court was furthering the *Chaplinski* doctrine.⁹⁴

The plurality cited *Milkovich* for the proposition that no "opinion defense" exists, and that all statements which hold a plaintiff up to "hatred, contempt or ridicule" are actionable.⁹⁵ The court claimed that *Milkovich* said:

Under the law of defamation, an expression of opinion could be defamatory if the expression was sufficiently derogatory This position was maintained even though the truth or falsity of an opinion—as distinguished from a statement of fact—is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation.⁹⁶

The court held that the only protection for defamatory expressions of opinion is the doctrine of "fair comment."⁹⁷ Thus, opinion is protected if the writer states a fair and honest expression of opinion on a matter of public concern⁹⁸ and the statement is "not made solely for the purpose of causing harm."⁹⁹ The court then commented that because *Hustler's* statements were made for the sole purpose of causing harm, and because the article would hold Spence up to hatred, contempt, and ridicule, the statements were "clearly defamatory."¹⁰⁰ The court reversed the summary judgment and re-opened the case.¹⁰¹ Justice Thomas, in a special concurrence, agreed with the reversal of summary judgment against *Hustler*. Justice Thomas' concern, however, was not whether the statements made by *Hustler* constituted fact or opinion. He reiterated the standard from *Falwell* that whether the statement was fact or opinion is an issue for a jury to decide.¹⁰² He also stated that the First Amendment does not give anyone the right to insult another.¹⁰³

The court was widely split on what determines whether a statement is fact or opinion. In dissent, Justice Golden claimed that the district court correctly granted summary judgment in favor of *Hustler*. Justice Golden criticized the plurality for boldly labeling the *Milkovich* case as the most important defamation decision in years, then failing to analyze the *Hustler* article under the *Milkovich* stan-

93. *Id.* at 776.

94. *Id.*

95. *Id.* at 775.

96. *Id.* (citing *Milkovich v. Lorain Journal*, 110 S. Ct. 2695, 2702-03 (1990)).

97. *Id.*

98. *Id.* (citing F. Harper & F. James, *Law of Torts* § 5.28, at 456 (1956)).

99. *Id.* (citing *Milkovich*, 110 S. Ct. at 2703).

100. *Id.* at 776.

101. *Id.* at 779.

102. *Id.* at 780 (Thomas, J., concurring specially).

103. *Id.* at 779-80.

dards.¹⁰⁴ Addressing the plurality's reliance on the "fighting words" doctrine of *Chaplinski*, Justice Golden pointed out that *Milkovich* never mentioned the *Chaplinski* case.¹⁰⁵

Justice Golden then established what he believes the test should be in determining whether statements in a published article are actionable. According to Justice Golden, the following factors must be analyzed:

1. The full context of the statements in the article since other unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content;
2. the broad social context or setting within which the allegedly defamatory statements appear;
3. the common usage or meaning of the specific language of the challenged statements;
4. whether the statements are capable of being verified, that is, objectively characterized as true or false.¹⁰⁶

Justice Golden compared the context of *Hustler's* article to insults in a barroom or schoolyard.¹⁰⁷ In examining the full context of the statements, Justice Golden claimed that a reasonable person would not have believed the statements to be anything more than opinion. The Justice made this determination because the article appeared on what was an editorial page in *Hustler*, a magazine well known for stating the opinion of its editor.¹⁰⁸

Analyzing the article in a broader social context, Justice Golden equated lawyer-bashing to razzing the umpire at a baseball game, stating that both were time-honored American traditions.¹⁰⁹ Justice Golden quickly disposed of the vulgarities as non-actionable even in their common usage.¹¹⁰ In dismissing the personal attack on Spence, Justice Golden stated that although the statements were assertions of fact, *Hustler* had formed a reasonable opinion based on disclosed facts.¹¹¹ Justice Golden found the article in question "nonactionable opinion about a public figure on a subject of public concern."¹¹²

104. See *supra* notes 56-65 and accompanying text. *Milkovich* established that defamation claims must be based on a provably false factual connotation.

105. *Spence v. Flynt*, 816 P.2d 771, 785 (Wyo. 1991) (Golden, J., concurring in part and dissenting in part).

106. *Id.* Justice Macy agreed with Justice Golden's test, as well. *Id.* at 782 (Macy, J., concurring in part and dissenting in part.)

107. *Id.* at 786 (Golden, J., concurring in part and dissenting in part).

108. *Id.*

109. *Id.* at 787-88.

110. *Id.* at 789 (citing R. Smolla, *Law of Defamation*, § 4.03, pp.4-10, and § 6.12, pp. 6-52 (1989)). Vulgarities themselves are not actionable. If a person is called an "asshole," the word itself is not actionable as defamation. See *supra* note 55.

111. *Spence v. Flynt*, 816 P.2d 771, 790 (Wyo. 1991) (Golden, J., concurring in part and dissenting in part). See also *infra* notes 130-33 and accompanying text.

112. *Spence*, 816 P.2d at 790 (Golden, J., concurring in part and dissenting in part).

Justice Macy concurred with the reversal of summary judgment, but disagreed with the court's analysis regarding the alleged defamatory statements. After applying the first three steps of Justice Golden's test, Justice Macy agreed that most of *Hustler's* statements could be excused as opinion or rhetorical hyperbole.¹¹³ However, Justice Macy did not think it was appropriate for the court to make an objective verification of the truth or falsity of the statements.¹¹⁴ Justice Macy thought that a jury should determine the reasonableness of the comments.¹¹⁵ This, in his opinion, made summary judgment of the case inappropriate.

ANALYSIS

The Wyoming Supreme Court erroneously applied the *Milkovich* standard by disregarding years of defamation precedent to reverse summary judgment in *Spence*. Had the court applied the *Milkovich* standard correctly, it would have found First Amendment protection for the entire *Hustler* article.

The Wyoming Supreme Court Erred in Its Interpretation of *Milkovich*

The Wyoming Supreme Court stated that defamation law has "moved along a strange path."¹¹⁶ Yet, nothing could be stranger than the court's own application of the *Milkovich* decision in *Spence*. After praising the *Milkovich* case as the most important decision in defamation law since 1967, the plurality opinion, in supposedly applying *Milkovich*, disregarded the test which the United States Supreme Court established.¹¹⁷ The "fighting words" rationale of *Chaplinski* that the plurality relies on has existed for almost fifty years, and no court has ever used it to permit recovery for speech in written form.¹¹⁸

part).

113. *Spence*, 816 P.2d at 782 (Macy, J., concurring in part and dissenting in part). See also *supra* note 55 and accompanying text.

114. *Spence*, 816 P.2d at 782 (Macy, J., concurring in part and dissenting in part.) Justice Macy believes that a jury could determine the character of the following statements:

1. *Spence* is a lawyer and lawyers "are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets."
2. *Spence's* "log-cabin image is . . . phony."
3. "*Spence* is more interested in promoting his bank account than the traditional values he'd like us to believe he cherishes."
4. "This case is a nuisance suit initiated by Dworkin."

See *supra* note 6.

115. *Spence*, 816 P.2d at 782 (Macy, J., concurring in part and dissenting in part).

116. *Id.* at 774.

117. *Milkovich v. Lorain Journal*, 110 S. Ct. 2695 (1990). See *supra* note 64 and accompanying text. A defamatory statement is actionable if it is verifiably false and if a reasonable person would believe it to be an assertion of fact. *Id.*

118. *Spence*, 816 P.2d at 785 (Golden, J., concurring in part and dissenting in part).

The Wyoming Supreme Court erred when it claimed that *Chaplinski* intimates such recovery.

Disregarding years of United States Supreme Court precedent, the plurality pulled an obscure rule out of context from the historical notes of *Milkovich*.¹¹⁹ By using this outdated rule, the court reinstates the necessity of good motives in criticizing public figures:

A public figure is not subject to defamatory attack and criticism just because he is a public figure. In other words, Larry Flynt is not free to rise each morning and select a public figure to attack and defame for no reason at all Thus if Spence [is a public figure], he may be subject to appropriate defamatory criticism - fair comment upon a matter of public concern.¹²⁰

For more than a quarter of a century the United States Supreme Court has held that liability for defamation cannot be imposed simply because a statement, be it true or false, was made without good intentions.¹²¹

The plurality developed a standard for defamation which precedes *New York Times v. Sullivan* and its progeny. *Milkovich* gave no indication of an intent to disregard twenty-five years of precedent in doing away with the notion that opinion was absolutely constitutionally protected. Quite the opposite, *Milkovich* expressly reaffirmed important United States Supreme Court precedent.¹²² The Wyoming Supreme Court's antiquated reasoning is clearly erroneous.

As demonstrated by the four separate opinions in the *Spence*

119. *Milkovich*, 110 S. Ct. at 2702 (referring to RESTATEMENT OF TORTS, § 606 (1938)). Section 606 reads:

- (1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,
- (a) is upon,
 - (i) a true or privileged statement of fact, or
 - (ii) upon facts otherwise known or available to the recipient as a member of the public, and
 - (b) represents the actual opinion of the critic, and
 - (c) is not made solely for the purpose of causing harm to the other

Id.

120. *Spence*, 816 P.2d at 776 (emphasis added).

121. *Garrison v. Louisiana*, 379 U.S. 64, 72-74 (1964).

[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run a risk that it will be proved in court that he spoke out of hatred . . . and the Constitutional prohibition in this respect is no different whether the plaintiff be considered a "public official" or a "public figure".

Id.

122. See *Milkovich*, 110 S. Ct. 2695. For example, *Milkovich* cites all of the following cases as precedent: *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967); *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970); *Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Falwell v. Hustler*, 485 U.S. 46 (1988).

case, the Wyoming Supreme Court is struggling to decide exactly what is actionable as a defamatory statement. Many state courts have already been most expedient in adopting the *Milkovich* standard. The *Milkovich* test, simply put, is this: A defamatory statement is actionable if it is verifiably false and if a reasonable person would believe it to be an assertion of fact. The test thus acts to assure that public debate will not suffer for the lack of imaginative expression or rhetorical hyperbole so rich in the history of our nation.¹²³

Correctly Applying the Milkovich Test in Spence v. Flynt

In the *Milkovich* opinion, Chief Justice Rehnquist set forth an extremely thorough history of defamation law in America.¹²⁴ However, this judicial history should not be confused with the actual decision in the case. One of the constitutional requirements expressed in *Milkovich* and reaffirmed by many state courts is that actionable defamation must be based on express or implied assertions of fact.¹²⁵ The issue to be decided is not whether a statement is defamatory. Instead, it is whether a defamatory statement is actionable. Whether a statement is an assertion of fact is not a question of fact, but a question of law, for the court to objectively determine.¹²⁶

In analyzing each of the three essential assertions which *Spence* claims to be defamatory, the Wyoming Supreme Court should have utilized the requirement that a defamatory statement must be an assertion of fact. The statements which *Spence* claims are defamatory include:

1. The description of *Spence* as an "asshole" and a "phony;"
2. the claim that *Spence's* motives were based on greed which caused him to sell out his personal values; and
3. the claim that *Dworkin's* lawsuit was a "nuisance" suit.¹²⁷

Had the court correctly applied the *Milkovich* standard to these assertions it would have found constitutional protection for each one.

First, being called an "ass-hole," and a "phony" are mere insults which have been held to be nonactionable throughout the path of defamation history.¹²⁸ In 1948, the Ohio Supreme Court, in *Bartow v.*

123. *Milkovich*, 110 S. Ct. 2695, 2706 (1990).

124. *Id.* at 2702-07.

125. *See supra* notes 64, 69-86 and accompanying text.

126. *See supra* notes 69-86.

127. *Spence v. Flynt*, 816 P.2d 771, 785-86 (Golden, J., concurring in part and dissenting in part).

128. *See, e.g.,* *Lund v. Chicago and Northwestern Transportation Co.*, 467 N.W.2d 366 (Minn. App. 1991) ("shit head"); *Cinquanta v. Burdett*, 388 P.2d 779 (Colo. 1964) ("crook", "dead beat"); *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966) ("bastard"); *Francis v. Emery Constr. Management Co.*, Civ. No. 1974-382 (D.V.I. 1974) ("shit head"); *Letter Carriers v. Austin*, 418 U.S. 264 (1974) ("traitor").

Smith,¹²⁹ held that “God-damned son-of-a-bitch” and “dirty crook” were “epithets, even if malicious, profane and in public” and ordinarily not actionable. The Colorado Supreme Court applied the same principle in *Bucher v. Roberts*.¹³⁰ The court “emphasize[d] that the mere use of foul, abusive or vituperative language . . . does not constitute a defamation.” The Court of Appeals, in *Curtis Publishing Co. v. Birdsong*,¹³¹ explained that “epithets . . . indicate that the individual who used them was under a strong emotional feeling of dislike towards those about whom he used them. Not being understood or intended as statements of fact they are impossible of proof or disproof.”¹³² Finally, in *McGuire v. Jankiewicz*,¹³³ the Illinois Court of Appeals classified calling someone an “asshole” as “objectionable, but unactionable” name calling. Accordingly, the crude insults made by *Hustler* in the *Spence* article should be classified as the exact types of imaginative expression and rhetorical hyperbole that the *Bresler/Letter Carrier/Falwell* line of cases was designed to protect.

Second, the Seventh, Eighth, and Tenth Circuits each have decided that statements questioning the motives of individuals are only subjectively, not objectively verifiable.¹³⁴ Granted, an opinion may be “actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.”¹³⁵ However, if the opinion is based on facts which have been disclosed, it is not actionable, no matter how derogatory or unreasonable it may be.¹³⁶ *Hustler* based its opinion that *Spence*’s motive was “greed” on disclosed facts, i.e. *Spence*’s fifty percent fee, 35,000-acre ranch, net worth, and large publicized judgments.¹³⁷ Given the disclosed facts, no reasonable person could infer false assertions of fact from the criticism of *Spence*’s motive. Therefore, the statements are not actionable.

Finally, to characterize the *Dworkin* case as a “nuisance” suit is to claim the case is without merit. This should have been dismissed as a mere observation and rhetorical hyperbole, a characterization with which the Federal District Court, in granting summary judgment,¹³⁸

129. 78 N.E.2d 735, 737 (Ohio 1948).

130. 595 P.2d 239, 241 (Colo. 1979) (citing *Cinquanta*, 388 P.2d 779 (Colo. 1963)).

131. 360 F.2d 344, 348 (5th Cir. 1966).

132. *Id.* at 348.

133. 290 N.E.2d 675, 676 (1972).

134. *Wood v. Evansville Press*, 791 F.2d 480 (7th Cir. 1986) (A television programmer sued when a newspaper implied his motive for running religious programming was greed, not religious belief); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986) (en banc) (Governor alleged an article implied he was driven by personal revenge in the prosecution of an Indian activist); *Rinsley v. Brandt*, 700 F.2d 1304 (10th Cir. 1983) (State of mind not objectively verifiable). Each of these cases looked at the context of the statements and held that the reasonable reader would not consider questioning a person’s motive [state of mind] as an assertion of fact.

135. RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977).

136. RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1977).

137. *Spence v. Flynt*, 816 P.2d 771, 790 (Wyo. 1991) (Golden, J., dissenting in part and concurring in part).

138. *Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408, 1421 (C. D. Cal. 1987).

and the Federal Court of Appeals, in affirming that decision,¹³⁹ agreed. This expedient application of the standards established in *Milkovich*, along with precedent set through years of defamation law, demonstrate that *Hustler's* article is protected under the First Amendment freedom of speech.

CONCLUSION

The Wyoming Supreme Court has taken a giant step backwards in preserving the First Amendment right to free speech. Through the *Spence* decision, Wyoming's highest court has recognized that while the First Amendment of the United States Constitution is essential to democracy under the ever-growing freedom of speech, there should be a limit to and protection against personal attacks. However, the court erroneously interpreted the *Milkovich* case and thereby disregarded years of established precedent. The *Milkovich* decision need not have such a dramatic impact in Wyoming. Had the court applied the *Milkovich* standard correctly, it would have come to the proper conclusion: the *Hustler* article is not actionable as defamation. However, the court chose to ignore the standard, and its decision has left Wyoming district courts guessing at what the law is. The Wyoming Supreme Court, in *Spence v. Flynt*, claims to be on the right path to the future, with the First Amendment in one hand, and *Milkovich* in the other. What it has yet to realize is that it is headed in the wrong direction.

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139. *Dworkin v. Hustler Magazine, Inc.*, 876 F.2d 1188, 1197 (9th Cir. 1989).