SUPREME COURT OF NEW YORK
NEW YORK COUNTY

Renco Group, Inc. v. Workers World Party, Inc.[1]
(decided September 26, 2006)

An article in the February 2006 print and online editions of the Workers World Paper stated that Renco Group founder Ira Rennert "robbed" the pension fund of steel corporation WCI Steel, Inc. ("WCI").[2] Renco, after unsuccessfully seeking a retraction,[3] filed suit for libel against publisher Workers World Party, Inc. ("WW"), a self-described "offshoot" of the Socialist Workers Party.[4] WW moved to dismiss the complaint.[5] The Defendants argued the statements at issue were protected speech under both the United States Constitution[6] and the New York State Constitution.[7] The Supreme Court, New York County, granted the motion on the grounds that the uses of the term "robbery" at issue were non-actionable statements of opinion.[8]

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[1] 2006 N.Y. Slip Op. 51809U, at *1 (Sup. Ct. Sept. 26, 2006).

[2] *Id*.

[3] *Id*., at *2.

[4] *Id*., at *3. Other defendants included the Workers World Paper, WW Publishers, and reporter Brenda Ryan. *Id*.

[5] *Id*., at *1.

[6] U.S. CONST. amend. I states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

[7] N.Y. CONST. art. I, § 8 states in pertinent part: "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

[8] *Renco*, 2006 N.Y. Slip Op. 51809U, at *5.

The published stories asserted that Ira Rennert, through Renco, was "robbing the pension fund" through bankruptcy reorganization plans for WCI.[9] Renco objected to the use of the term "robbing," stated that the Group had done no such thing, insisted on a retraction, and demanded that WW apologize.[10] WW refused and stood by its stories.[11] The stories at issue also accused Bethlehem Steel, Delphi Automotive Systems, and United Airlines of using bankruptcy protection to "steal workers' pensions."[12] Further, Alcoa, Delta Airlines, and IBM were accused of moving to "deprive workers of pensions," and the articles argued for work-controlled pensions in order to protect funds.[13] The court noted that, "Next to the 'Workers World' heading on the [Defendants'] web site is the phrase 'workers & oppressed people of the world unite.' "[14] The Defendants specifically argued that the statements were not actionable as libel because they were opinion, particularly when they were read in the context of the publication as a whole and in light of WW's connection to the Socialist Workers Party.[15] The Socialist Workers Party is a self-described " 'agitator for social reform,' " which applies a " 'revolutionary analysis to current events.' "[16]

In granting the motion, the Supreme Court, New York County, reasoned that the New York Constitution provides even

[9] *Id.*, at **1, 2.
[10] *Id.*, at *2.
[11] *Id.*
[12] *Id.*
[13] *Renco*, 2006 N.Y. Slip Op. 51809U, at *2.
[14] *Id.*
[15] *Id.*, at *3.
[16] *Id.*

greater protection for statements of opinion than the United States Constitution.[17] Further, the reasonable reader, when considering the term "robbery" in the case, would not apply a criminal meaning to the term, but instead would recognize it as advocacy.[18]

> The [Workers World] Party, a strongly ideological political party that has a 'socialist' and 'revolutionary' perspective, in its scathing criticism of the pension system, employed colorful rhetoric that is the hallmark of hyperbole. Thus . . . considering the articles as a whole and the advocacy purpose for which the articles were published . . . the statements therein alleged to be libelous are in fact nonactionable opinion.[19]

As public advocacy, draped in such rhetoric, the court determined that prior rulings on the United States and New York Constitutions required the Defendant's motion to dismiss be granted.[20]

The United States Supreme Court dealt with the issue of actionable libel versus protected opinion in the context of an accusation of a crime—perjury—in a news article, in *Milkovich v. Lorain Journal*.[21] The case centered on a brawl at an Ohio high school wrestling match, a series of disciplinary hearings that followed, and the coverage of these events in the local newspaper.[22] Specifically, Lake County News-Herald reporter J. Theodore Diadiun, in his sports column "TD Says," penned that Plaintiff

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[17] *Id*., at *4 (quoting Gross v. New York Times, 623 N.E.2d 1163, 1167 (N.Y. 1993)).
[18] *Renco*, 2006 N.Y. Slip Op. 51809U, at *5.
[19] *Id.*
[20] *Id.*
[21] 497 U.S. 1 (1990).
[22] *Id*. at 4.

wresting coach Michael Milkovich lied before the Court of Common Pleas of Franklin County, Ohio, about the events leading up to the brawl.[23] The column stated: " 'Anyone who attended the meet . . . knows in his heart that Milkovich and Scott, [a non-party to the case,] lied at the hearing after each having given his solemn oath to tell the truth.' "[24] The newspaper defendant argued for a ruling that firmly established a category of First Amendment protection for statements of opinion, as opposed to those of fact.[25] The Court rejected this notion, primarily on the grounds that:

> [E]xpressions of 'opinion' may often imply an assertion of objective fact. If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.[26]

The Court also noted that such a statement could have been as potentially damaging to Jones' reputation as a statement without the word "opinion" inserted.[27] Thus, the Court held that adequate protection already exists for media defendants[28] without "additional separate constitutional privilege for 'opinion' . . . to ensure the freedom of expression guaranteed by the First Amendment."[29]

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[23] *Id.*
[24] *Id.* at 5.
[25] *Id.* at 17.
[26] *Milkovich*, 497 U.S. at 18-19.
[27] *Id.* at 19.
[28] *See id.* at 17.
[29] *Id.*

Nevertheless, the Court noted that "loose, figurative, or hyperbolic language" and indeed the overall "tenor" of an article can counter the impression that the author and publisher were making serious accusations of criminal activity.[30] Finally, the Court indicated that an examination of whether an allegedly libelous statement is capable of being established as true or false remains at the heart of an examining court's inquiry.[31]

In his dissent to the majority's opinion in *Milkovich*, Justice Brennan argued for a closer examination of the context of an article in such a case.[32] Justice Brennan indicated that he would have ruled in favor of the newspaper because the statements connoting perjury were clearly speculation and supposition,[33] and did not imply "a factual assertion that Milkovich perjured himself at the judicial proceeding."[34] Further, the statement at issue was obvious hyperbole, as Diadiun clearly cannot claim to know what every person who attended the hearing "knows in his heart" as the article purports to claim.[35] Lastly, Justice Brennan argued that certain formats, such as editorials, cartoons, letters to the editor, and in this matter, a signed columnist piece, signal to readers to "anticipate a departure from what is actually known by the author as fact."[36]

The New York Court of Appeals addressed the treatment of

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30 *Id.*
31 *Milkovich*, 497 U.S. at 21.
32 *Id.* at 26-27 (Brennan, J., dissenting).
33 *Id.* at 28.
34 *Id.*
35 *Id.* at 32.
36 *Milkovich*, 497 U.S. at 32 (Brennan, J., dissenting).

opinion versus fact, in the context of libel suits, in *Immuno AG v. Moor-Jankowski*,[37] a case remanded to New York's highest court by the United States Supreme Court for reconsideration in light of *Milkovich*.[38] The case was before the court on a motion for summary judgment that had been granted by the courts below.[39] The case centered on the content of a letter to the editor submitted to the Journal of Medical Primatology ("Journal") by Dr. Shirley McGreal.[40] The letter detailed a plan by Austrian corporation Immuno AG ("AG"), of which McGreal was strongly critical, to establish a hepatitis research facility for chimpanzee testing in Africa.[41] The letter claimed that AG's purpose behind the plan was "presumably to avoid international policies or legal restrictions" concerning endangered chimpanzees, the chimpanzee population might be decimated by the capture and killing of the test animals and their mothers, and that "returning the animals to the wild could well spread hepatitis to the rest of the chimpanzee population."[42]

The New York Court of Appeals concluded that the statements were nonactionable under both the Supreme Court's stated constitutional interpretations and under the New York Constitution.[43] The court first examined *Milkovich* to determine the applicable test.

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[37] 567 N.E.2d 1270 (N.Y. 1991).

[38] *Id.* at 1272.

[39] *Id.*

[40] *Id.*

[41] *Id.* The suit also brought a defamation claim against Journal editor Dr. J. Moor-Jankowski for statements made elsewhere, and libel charges against Moor-Jankowski and other parties involved in the publication of the Journal. *Id.* at 1273. By the time the Court of Appeals rendered this decision, Moor-Jankowski was the only remaining defendant. *Id.*

[42] *Immuno AG*, 567 N.E.2d at 1272.

[43] *Id.* at 1273.

"[I]t appears that the following balance has been struck between First Amendment protection for media defendants and protection for individual reputation: except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable."[44] In its application of *Milkovich*, the court ruled that the statements could be actionable, as the language of the letter contained both asserted and implied statements of fact[45] in a tone that was "restrained, . . . seriously maintained, and . . . [with] an apparent basis in fact."[46] However, the court ruled that because AG failed to meet its burden of establishing the statements as false, summary judgment for Moor-Jankowski was property granted.[47]

Next, the court conducted a state-law analysis, beginning with the interpretation that the freedom of speech guaranteed under the State Constitution[48] is intentionally distinct from the phrasing in the First Amendment.[49] "Thus . . . the 'protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by' the Federal Constitution."[50] The state analysis, the court writes, takes into account the context of a published article that is the basis of a defamation suit, as well as its content, tone and purpose, and not to

[44] *Id*. at 1275.
[45] *Id*.
[46] *Id*. at 1276.
[47] *Immuno AG*, 567 N.E.2d at 1276.
[48] N.Y. CONST. art. I, § 8.
[49] *Immuno AG*, 567 N.E.2d at 1277.
[50] *Id*. at 1278 (quoting in part O'Neill v. Oakgrove Constr., 523 N.E. 277, 281, n.3 (N.Y.

isolate individual words or phrases.[51] The broad context of the allegedly libelous remarks in the case was in a letter to the editor, which the court determined would affect how the average reader would interpret the statements, as such letters generate expectations that the opinions of the writer, as opposed to factual statements, will be presented.[52] Further, to focus on the more specific context, since the Journal is directed at a specific, well-educated and well-informed group of doctors and scientists, the average reader is likely to have a grounded understanding of the issues McGreal's letter addresses.[53] "Thus, like the broader social setting of McGreal's letter, the immediate context of the letter . . . would induce the average reader of this Journal to look upon the communication as an expression of opinion rather than a statement of fact, even though the language was serious and restrained."[54]

Finally, the *Immuno* court emphasized that the New York approach to libel, especially by a media defendant, will allow protection for more statements than just those couched in "loose, figurative or hyperbolic language in charged circumstances."[55] "[F]alse statements are actionable when" a reasonable reader would perceive them as containing express or implied facts, "[b]ut statements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as

1988)).

[51] *Id*. at 1278.

[52] *Id*. at 1280.

[53] *Id*.

[54] *Immuno AG*, 567 N.E.2d at 1281.

[55] *Compare Immuno AG*, 567 N.E.2d at 1280-81 *with Milkovich*, 497 U.S. at 21.

expressing or implying *any* facts."[56]

In *Gross v. New York Times*,[57] the court of appeals implemented a three-part test for courts to apply in defamation actions and considered whether "hypothetical" language could form the basis for a libel action.[58] The case stemmed from a series of investigative reports by the New York Times that charged a former chief medical examiner "with having mishandled several high profile cases and having used his authority to protect police officers and other city officials . . . after individuals in their custody had died under questionable circumstances."[59] The news stories led to a number of criminal investigations of the Plaintiff, none of which found evidence of professional or criminal misconduct.[60] The court furnished a test for whether a reasonable reader of the allegedly libelous statement could find that the statement at issue contained facts about the plaintiff, stating a court should examine:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to "signal . . . readers or listeners that what is being read or heard is likely to be of opinion, not fact."[61]

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[56] *Immuno AG*, 567 N.E.2d at 1281 (emphasis in original).
[57] 623 N.E.2d 1163 (N.Y. 1993).
[58] *Id*. at 1167. *See infra* note 61 for the three-part test.
[59] *Id*. at 1165.
[60] *Id*.
[61] *Id*. at 1167 (quoting in part Steinhilber v. Alphonse, 501 N.E.2d 550, 554 (N.Y. 1986)).

The court held that while many of the assertions in the published reports were likely to be understood by readers to be "mere hypotheses premised on stated facts,"[62] there were also charges contained in the publications that, "although couched in the language of hypothesis or conclusion, actually would be understood by the reasonable reader as assertions of fact."[63] These, the court held, were actionable because of the context as a whole: a protracted series of newspaper reports after a purportedly exhaustive investigation.[64]

In *Armstrong v. Simon & Schuster, Inc.*,[65] the court of appeals addressed, but did not rule on, the concept of defamation by implication.[66] The case involved the book "Den of Thieves," published by Simon & Schuster and purporting to detail some of the schemes of insider trading and the prosecution of traders during the 1980s.[67] Plaintiff Michael Armstrong was a criminal defense attorney representing at least two of the alleged insider traders named in the book, and, in one paragraph, was accused by the author of unsuccessfully trying to have one client sign an affidavit exonerating another client, despite untruths in the affidavit.[68] Notably, the court of appeals did not restate the three-part test from *Gross*, but instead stated a simpler test. "Where a plaintiff alleges that statements are false and defamatory, the legal question for the court on a motion to

[62] *Gross*, 623 N.E.2d. at 1168.
[63] *Id.*
[64] *Id.* at 1169.
[65] 649 N.E.2d 825 (N.Y. 1995).
[66] *Id.* at 829-30.
[67] *Id.* at 826.
[68] *Id.* at 828. Although the Plaintiff argued that other passages were also libelous, the court focused its analysis on this one section. *Id.*

dismiss is whether the contested statements are reasonably susceptible of a defamatory connotation."[69] The court reiterated that in making that determination, the entire context of the publication must be considered.[70] However, the court mused that this might be an instance of defamation by implication, an area of law not previously considered under New York law.[71] It held, though, that the matter was that of "allegedly false statements of verifiable fact, with inferences flowing from those facts" and not one where "the passage in issue must be stretched and extrapolated by subjective interpretations in order to find any possible falsity."[72] As such, the court declined to consider the appropriate standard for defamation by implication, and ruled the Plaintiff had the burden of proving as true the allegedly false statements.[73]

The New York Court of Appeals also addressed the problems associated with separating out actionable statements from protected expressions of opinion in *Brian v. Richardson*.[74] That matter concerned an article titled "A High-Tech Watergate," which was written by former United States Attorney General, and defendant, Elliot L. Richardson, and published on the Op Ed page of the New York Times.[75] The piece accused former California heath secretary Dr. Earl W. Brian of participation in an illegal conspiracy involving

[69] *Id*. at 829 (citing Weiner v. Doubleday & Co., 549 N.E.2d 453, 455 (N.Y. 1989)).
[70] *Armstrong*, 649 N.E.2d at 829.
[71] *Id*.
[72] *Id*. at 829-30 (internal quotation marks omitted).
[73] *Id*.
[74] 660 N.E.2d 1126 (N.Y. 1995).
[75] *Id*. at 1127-28.

the software company Inslaw.[76] The *Brian* court first recounted that libel claims, in order to be actionable, must be both defamatory and false, and thus must be based on assertions of fact, not opinion.[77] Unlike in *Armstrong*, the court restated the three factors courts should consider in distinguishing between contentions of fact and statements of opinion.[78] This time, however, the court expounded upon the final factor, "the full context," noting that while the appearance of a published piece in places traditionally reserved for opinion is not dispositive as protected, it should be considered.[79] Lastly, the court noted that "the identity, role and reputation of the author may be factors to the extent that they provide the reader with clues as to the article's import."[80] It likened Brian's piece appearing in the New York Times to the letter to the editor published in *Immuno AG*, stating that the reader's expectation is that such submissions represent opinion and will "contain considerable hyperbole, speculation, [and] diversified forms of expression . . . ."[81] Furthermore, the court took into account that:

> Most of the accusations about plaintiff that defendant recounted were identified in the article as mere 'claims' that had been made by identified and unidentified sources. . . . [A]lthough defendant unquestionably offered his own view that these sources were credible, he also set out the basis for that personal opinion, leaving it to the readers to evaluate it

[76] *Id.* at 1128.
[77] *Id.* at 1129.
[78] *Id.*
[79] *Brian*, 660 N.E.2d at 1130.
[80] *Id.*
[81] *Id.*

> for themselves. Thus, there was no suggestion in the article that there were additional undisclosed facts on which its credibility had been based.[82]

This was not, the court reasoned, a case of, "In my opinion, John Jones is a liar."[83] Interestingly, the *Brian* court did not analyze either of the other two factors enumerated in *Gross v. New York Times*—the precise meaning of the language used; whether the statements were capable of being established as true or false—but focused exclusively on the context factor.

The New York State and United States Constitutions both operate to protect published expressions of pure opinion from being actionable as libel. The federal protections, however, are curbed by *Milkovich*'s requirement that courts must find the basis for the opinion being presented in the communication as well.[84] As that opinion makes clear, for federal protections to activate, the statements at issue must be grounded in disclosed facts upon which the opinion is based or the statement must be one that is incapable of being proven true or false.[85] Further, the federal analysis begins with an examination of the statement itself for indications of express and implied assertions of fact.[86] New York affords a greater degree of protection to speech challenged as libelous. First, the court has rejected the notion that only speech presented in "loose, figurative or

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[82] *Id*. at 1131.

[83] *See Milkovich*, 497 U.S. at 18-19.

[84] *Id*.

[85] *Id*. at 18, 19, 21.

[86] *Id*. at 19. *See also Brian*, 660 N.E.2d at 1130-31 and *Immuno AG*, 567 N.E.2d at 1281 (comparing the New York Court of Appeals decision to begin the analysis with context, as opposed to the federal analysis starting point of express and implied assertions of fact).

hyperbolic language"[87] will be protected.[88] Second, New York places specific and great emphasis on the context, both narrow and broad, of the allegedly libelous statement. In that sense, an examining court will consider the location within a publication the contested statement appears,[89] the entire content of the publication and contested statements,[90] and the tone and intent of the communication.[91]

A question remains, however, whether the protection afforded free speech in the state is actually "more flexible and . . . more protective,"[92] as New York courts have consistently claimed, as than that set forth in *Milkovich*. As described above, both tests analyze the same basic question: whether or not a reasonable reader would conclude the challenged statements are facts about the plaintiff. Furthermore, neither the federal nor New York state courts recognize a special category of protection for statements of pure opinion.[93] The greater protection afforded speech in New York then, must stem from New York's contextual considerations. Yet, even in that area, the court of appeals has limited the protections stemming from context.[94] Finally, the court of appeals may be incorrect in its assertion, in

[87] *Id*. at 21.

[88] *See, e.g.*, *Gross*, 632 N.E.2d at 1167; *Immuno AG*, 567 N.E.2d at 1280-81.

[89] *Brian*, 660 N.E.2d at 1130.

[90] *Id*. at 1129.

[91] *Id*. at 1129-30 ("[C]ourts must consider the content of the communication as a whole, as well as its tone and apparent purpose . . . .").

[92] *See, e.g.*, *Gross*, 623 N.E.2d at 1167.

[93] *See id*. ("The Supreme Court has rejected the notion that there is a special categorical privilege for expressions of opinion as opposed to assertions of fact . . . [and] this Court has adopted a similar view . . . .").

[94] *Brian*, 660 N.E.2d at 1130. "The forum in which a statement has been made, as well as the other surrounding circumstances comprising the 'broader social setting,' *are only useful gauges* for determining whether a reasonable reader . . . would understand the complained-of assertions as opinion or statements of fact." *Id.* (emphasis added).

Immuno AG, that only statements made with "loose, figurative, hyperbolic language" escape the inquiry into whether the statement implies assertions cable of being proven true or false.[95] The Supreme Court in *Milkovich* expressly indicated that "the general tenor of the article [may] negate this impression" that the author was maintaining a serious assertion of fact rather than one of opinion.[96] It is not clear from that statement by the Court whether it merely intended to protect other forms of language besides hyperbole—such as sarcasm or irony, or whether "the general tenor of the article" indicated an intent to examine the contested statement in a larger context. If the Supreme Court meant the latter, the distinction between the state and federal inquires largely disappears.

Edward Puerta

[95] *Immuno AG*, 567 N.E.2d at 1275.
[96] *Milkovich*, 497 U.S. at 21.