STATE OF MICHIGAN

COURT OF APPEALS

STEVEN M. GURSTEN and MICHIGAN AUTO LAW, PC,

Plaintiffs-Appellants,

v

JOHN DOE 1, also known as TOM MAHLER, JOHN DOE 3, also known as MARCELLUS FRANCES and VICTOR LANDON, SR., and JOHN DOE 4, also known as VEGAN4 LIFE and ARIELLE HIPPIE GIRL, and JOHN DOE 5, also known as STOP EATING ANIMALS,

Defendants,

and

JOHN DOE 2, also known as PATRICK ANDERSON,

Defendant-Appellee.

UNPUBLISHED
March 18, 2021

No. 352225
Oakland Circuit Court
LC No. 2019-171503-NO

Before: LETICA, P.J., and GLEICHER and O'BRIEN, JJ.

GLEICHER (*dissenting*).

In *Milkovich v Lorain Journal Co*, 497 US 1, 18; 110 S Ct 2695; 111 L Ed 2d 1 (1990), the United States Supreme Court held that "expressions of 'opinion' may often imply the assertion of objective fact," rendering them potentially susceptible to tort sanction. In summarily rejecting plaintiffs' defamation claim, the majority ignores *Milkovich*, holding that because the statement at issue is one of "pure opinion," it is absolutely protected by the First Amendment. The majority compounds this error by failing to regard as true the factual allegations in plaintiffs' complaint. Contrary to the majority, those allegations (at least at this stage) support that as to defendant John Doe 2, plaintiffs' amended complaint sets forth an actionable claim of defamation by implication. I would reverse the trial court, and respectfully dissent.

I. BACKGROUND FACTS AND PROCEEDINGS

Plaintiff Steven M. Gursten is an attorney and a principal of Michigan Auto Law, PC. Defendant John Doe 2 posted a review of Gursten and his firm on "Google Review," an Internet service that allows consumers to add reviews regarding a company's products and services to the Google Maps application. Using the pseudonym "Patrick Anderson," John Doe 2 published a one-star review of Gursten, representing the worst possible rating.

Plaintiffs denied that "Patrick Anderson" had ever been a client of the firm or that anyone in the firm had ever spoken to someone with that name. According to plaintiffs' complaint, the review encapsulated "an implied statement that [the reviewer] has conducted business with Plaintiffs, or has discussed the potential to do business with the Plaintiffs, and that other[s] should not do business with the Plaintiffs." Plaintiffs' amended complaint further averred:

> 31. The one-star review is a false and defamatory publication as it implies that Defendant John Doe 2 was a client of Plaintiff Steven M. Gursten, or that Defendant John Doe 2 has spoken to Plaintiff Steven M. Gursten when, in fact, he/she has not.
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> 32. Defendant John Doe 2 published the one[-]star review of and concerning Plaintiff Steven M. Gursten with an intent to cause damage to Plaintiff Steven M. Gursten's reputation, to injure him in his trade and profession, and to dissuade potential clients from doing business with him.
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> 33. Defendant John Doe 2 published the one-star review either negligently or with actual malice as it was made with knowledge of its falsity and/or reckless disregard for the truth.

John Doe 2 moved for summary disposition under MCR 2.116(C)(8). The trial court ruled that the one-star review was "pure opinion and is not a statement capable of being defamatory." The court reasoned that "[e]ven if the review implies that John Doe 2 had an experience with [p]laintiffs as [p]laintiffs contend, the Court does not find that this implication would render what would otherwise be pure opinion, defamatory."

The majority adopts the trial court's analysis, holding that "a one-star wordless review posted on Google Review is an expression of opinion protected by the First Amendment." Quoting this Court's opinion in *Ghanam v Does*, 303 Mich App 522, 546-547; 845 NW2d 128 (2014), the majority explains that when it comes to opinions expressed on the Internet, such statements " 'are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact[.]' " The opinion is not actionable, the majority elaborates, because it "could not imply an assertion of objective fact." Moreover, the majority holds, plaintiffs "fail[ed] to establish how John Doe 2's one-star review was materially false," and have not discerned John Doe 2's identity.

Respectfully, the majority misapprehends the law governing defamation by implication and blurs the distinction between a claim's legal sufficiency and its factual sufficiency.

II. ANALYSIS

John Doe 2 has not challenged that a one-star review is defamatory. Because the comment discredits plaintiffs' professional competence in the mind of a reasonable reader, it meets that standard. See *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010) (quotation marks and citation omitted) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."). Establishing that a statement is defamatory is but the first step in a longer and far more complicated analytical journey.

Contrary to the majority, affixing the "opinion" label on a libel does not automatically render the statement nonactionable. The majority ignores the leading case on the subject—*Milkovich*. *Milkovich* firmly contradicts the majority's notion that "opinion" speech is fully immune from tort liability. Because the majority disregards *Milkovich*, it fails to examine the central question in this case: whether the Google review harbors a provably false assertion of objective fact, thereby subjecting John Doe 2 to potential liability for defamation by implication. This unanswered question is at the heart of the inquiry under MCR 2.116(C)(8). In my view, *Milkovich* compels us to reverse the trial court.

A. DEFAMATION BY IMPLICATION

Plaintiffs have limited their claim to one of defamation by implication.

Liability for defamation by implication may be imposed based not from what is affirmatively stated, but from what is implied when a defendant "juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts [such that] he may be held responsible for the defamatory implication . . . ." Prosser & Keeton, Torts (5th ed), § 116, p 117. "A defamation by implication stems not from what is literally stated, but from what is implied." *White v Fraternal Order of Police*, 909 F2d 512, 518 (DC Cir 1990). Michigan's common law recognizes this tort. *Hawkins v Mercy Health Servs, Inc*, 230 Mich App 315, 329; 583 NW2d 725 (1998); see also *Locricchio v Evening News Ass'n*, 438 Mich 84; 476 NW2d 112 (1999).

Truth is an absolute defense to any defamation claim. Based on dicta in *Gertz v Robert Welch, Inc*, 418 US 323, 339-340; 94 S Ct 2997; 41 L Ed 2d 789 (1974), many courts regarded opinion as protected speech under the First Amendment. See, e.g., *Ollman v Evans*, 750 F2d 970, 975 (DC Cir 1984) (en banc). *Milkovich* corrected any misconception about a "pure opinion defense," explaining:

> [W]e do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact. [*Milkovich*, 497 US at 18 (citation omitted).]

Protection of First Amendment values does not require "a separate constitutional privilege for 'opinion,' " the Supreme Court declared. *Id*. at 21.

The Supreme Court explained that expressions of opinion that harm a person's reputation are potentially actionable if they imply a fact about the person that proves untrue or "incomplete." The Court offered the following example:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think. . . .' " It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement Torts 2d, § 566, cmt a . [*Milkovich*, 497 US at 18-19.]

In *Smith*, 487 Mich at 129, our Supreme Court expressly adopted this reasoning, holding that "even a statement of opinion may be defamatory when it implies assertions of objective facts." The *Smith* Court reiterated that "a statement of opinion that can be proven to be false may be defamatory because it may harm the subject's reputation or deter others from associating with the subject." *Id*. at 128. The "dispositive question" in that case was "whether a reasonable factfinder could conclude that the statement [at issue] implies a defamatory meaning." *Id*. This case presents the same question.

Milkovich supplies the governing legal principles that must guide a court when considering an "opinion" defense to a claim of defamation by implication. But instead of engaging with *Milkovich*, the majority relies on two cases from this Court bearing only tangential relevance here: *Ghanam*, 303 Mich App 522, and *Edwards v The Detroit News, Inc*, 332 Mich App 1; 910 NW2d 394 (2017). I turn to a discussion of those cases.

B. THE MAJORITY'S ANALYSIS LOOKS TO THE WRONG PRECEDENT

The majority holds that because the Google review is an "opinion," it is entitled to full protection under the First Amendment. That is not the lesson of *Milkovich*, and is contradicted by both *Milkovich* and *Smith*. The majority cites *Edwards* for the proposition that "as a matter of law, a one-star wordless review posted on Google Review is an expression of opinion protected by the First Amendment." *Edwards*, however, is not on-point.

That case involved a direct libel, meaning that the defamatory nature of the statement arose from the statement's plain or obvious meaning. This case involves defamation by implication, an indirect form of reputational harm in which the statement's defamatory character results from the statement's insinuations, innuendos, or contextual gaps. The defense in *Edwards* centered on the statement's truth. Here, the defense currently centers on a different question: whether the statement is a pure opinion without defamatory implications.

Edwards represents a thoughtfully reasoned exploration of libel law stemming from an allegation that the plaintiff was a leader in the Ku Klux Klan. The case involved public speech (an editorial published in a daily newspaper), of public concern, about a public figure (a well-known radio host). In that realm, "the First Amendment provides maximum protection to public speech about public figures with a special solicitude for speech of public concern." *Edwards*, 322 Mich App at 13 (quotation marks and citation omitted). And the statement at issue had all the hallmarks of an opinion. But our identification of the statement as "opinion" did not end our analysis.

Our decisional lens in *Edwards* focused on whether the statement was true, not whether it was an opinion. We recognized that styling the statement as an opinion did not necessarily immunize it. In other words, we could not avoid analytical work by simply characterizing the statement as an "opinion" and calling it a day. We meticulously parsed the statement's words and their context to determine whether the statement's components were both "necessarily subjective" and "objectively verifiable." *Id*. at 20. Only after careful dissection along both planes did we conclude that both conditions were met, and that "even if otherwise defamatory," the statement "was not actionable under Michigan law." *Id*. No comparable analysis appears in the majority opinion.

Ghanam is not helpful, either. Like *Edwards*, the plaintiff in *Ghanam* was a public figure. The question presented was whether the statements posted online by anonymous defendants contained an assertion of objective fact such that a reasonable factfinder could conclude that the statements had a defamatory meaning. *Ghanam*, 303 Mich App at 545. As in *Edwards*, this Court carefully analyzed the statements and their contexts, ultimately concluding that they were not defamatory because they did not assert any facts, or alternatively represented "rhetorical hyperbole" or "sarcasm." *Id*. at 548-549. The statements "were made facetiously and with the intent to ridicule, criticize, and denigrate plaintiff rather than to assert knowledge of actual facts." *Id*. at 550. The Court summarized, "Review of these statements in context leads us to conclude that they cannot be regarded as assertions of fact but, instead, are only acerbic critical comments directed at plaintiff based on facts that were already public knowledge . . . ." *Id*. In other words, a reasonable reader would not interpret the statements as factual, and therefore the plaintiff failed to plead an actionable claim for defamation by implication.

In both *Edwards* and *Ghanam*, this Court endeavored to determine whether the defamatory statement contained factual assertions. In *Edwards*, this Court then considered whether the factual assertion was true. The majority's central error in this case is that it races to the "opinion" bottom line without first considering whether the statement contains a factual assertion.

C. THE FACTUAL KERNEL WITHIN THE GOOGLE REVIEW

"[A]llegedly defamatory statements must be analyzed in their proper context." *Smith*, 487 Mich at 129. The statement must also be examined " 'in its totality in the context in which it was uttered or published.' " *Id*., quoting *Amrak Prods, Inc v Morton*, 410 F3d 69, 72-73 (CA 1, 2005). We may not focus on " 'merely a particular word or sentence,' " but must strive to interpret the statement's gist. *Smith*, 487 Mich at 129, quoting *Amrak Prods*, 410 F3d at 73; see also Hawkins, 230 Mich App at 333.

The trial court granted summary disposition to defendants under MCR 2.116(C)(8). When reviewing that ruling, we must accept all factual allegations in the complaint as true. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). Summary disposition may be granted under subsection (C)(8) only "when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id*. Application of this standard requires that this case continue pending factual development.

The statement at issue is a review of a law practice in a context suggesting that the reviewer was or had been a client of the law firm. The Google Review content policy provides, in relevant part: "Contributions must be based on real experiences and information." Maps User Contributed Content Policy, available at <https://support.google.com/contributionpolicy/answer/7422880> (accessed January 18, 2021). As the majority acknowledges, the policy also provides that "content should reflect . . . genuine experience at the location and should not be posted just to manipulate a place's ratings." Even without notice of these warnings, a reasonable reader would believe that the reviewer had an actual experience with the firm, and that the negative review was premised on true, first-hand information.

The majority offers two reasons for rejecting this analysis. First, the majority asserts, "plaintiffs fail to establish how Doe 2's one-star review was materially false." But at this stage, plaintiffs need not "establish" anything. A motion brought under MCR 2.116(C)(8) tests only the legal sufficiency of the complaint, and nothing more. Plaintiffs adequately pleaded a defamation by implication claim; whether they can ultimately "establish" that the review was materially false will depend on what is learned during discovery. "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *El-Khalil*, 504 Mich at 160.

The majority additionally posits that the review "could reflect any experience with plaintiffs, including their website, physical location, blogs, in-court interactions, or appearance." Our frame of reference, however, is that of a reasonable reader. How a reasonable reader would view the statement generally constitutes a jury question:

> It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication. [Restatement Torts 2d, § 566,p 173.]

And it is far more reasonable that a reader would interpret the one-star review as an indictment of the law firm's professional competency. It is far-fetched at best to think that in this context, a reviewer meant only to comment on the firm's website, as the majority suggests.

The real issues are whether the statement is reasonably capable of a defamatory meaning and whether the facts on which the opinion rests were "either incorrect or incomplete." *Milkovich*, 497 US at 19. If the Google poster was not a bona fide consumer of legal services but instead created the review to enhance his or her own economic interests, or solely to damages plaintiffs', those omitted facts would support a defamation claim. *Id*. at 18-19. Alternatively, if the poster

proves to be a genuine client of the firm, the posting would qualify as protected opinion speech because it harbors no false implications.

At this point, we must assume that which plaintiffs' have alleged—the poster's expressed opinion rested on nothing more than economic or personal animus, not actual experience. I would remand to permit the parties to conduct discovery focused on identifying the poster and determining whether he or she was truly a client of the firm or a person who had otherwise had an unsatisfactory interaction with it.

That said, plaintiffs have a difficult road ahead. Despite that *Milkovich* does not preclude their claim at this stage, the First Amendment does offer substantial protection of John Doe 2's right to opine regarding plaintiffs' competence, work product, and legal abilities. If a substantially true implication or real facts underlie John Doe 2's opinion, the First Amendment likely shields him or her from tort liability. As a matter of constitutional law, however, it is too early to make that determination.

/s/ Elizabeth L. Gleicher