

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MICHAEL MILKOVICH, SR., Petitioner

V. LORAIN JOURNAL CO., ET AL.

CASE NO: 89-645

PLACE: Washington. D.C.

DATE: April 24, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL MILKOVICH, SR., :

4 Petitioner :

5 V. : No. 89-645

6 LORAIN JOURNAL CO., ET AL. :

7 - - - - -x

8 Washington, D.C.

9 Tuesday, April 24, 1990

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:10 a.m.

13 APPEARANCES:

14 BRENT LAWSON ENGLISH, ESQ., Cleveland, Ohio; on behalf of
15 the Petitioner.

16 RICHARD D. PANZA, ESQ., Lorain, Ohio; on behalf of the
17 Respondents.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

BRENT LAWSON ENGLISH, ESQ.

On behalf of the Petitioner

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RICHARD D. PANZA, ESQ.

On behalf the Respondents

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REBUTTAL ARGUMENT OF

BRENT LAWSON ENGLISH, ESQ.

On behalf of the Petitioner

42

1 MR. ENGLISH: Your Honor, not a general matter
2 of public concern, but certainly a matter of public
3 concern as to the local communities involved.

4 QUESTION: Does it fall under the rubric of the
5 Hepps case?

6 MR. ENGLISH: Your Honor, I believe it does fall
7 under the rubric of the Hepps case, and had the Hepps case
8 been properly followed by the trial court, clearly this
9 case would have been actionable as opposed to absolutely
10 privileged.

11 QUESTION: And if it's -- if Hepps applies, then
12 the plaintiff below would have the burden of proving
13 falsity?

14 MR. ENGLISH: Without a doubt, Your Honor, that
15 is absolutely the case.

16 QUESTION: And are these statements capable of
17 being proven false?

18 MR. ENGLISH: Your Honor, these statements are
19 quite capable of being proven false. There are actually
20 four statements unequivocally that could be proven false.

21 As the Supreme Court of Ohio in the Milkovich
22 decision in late 1984 held, the primary impact of this
23 article is to accuse the petitioner of committing the
24 crime of perjury. The proceeding at which the alleged
25 perjury occurred was of records, stenographically

1 recorded, and clearly the testimony at that proceeding
2 could easily be compared with the statements that Mr.
3 Milkovich had made previously as to the same question.
4 And thus, a reasonable jury could determine whether or not
5 the statements in fact were false or whether they were
6 true.

7 QUESTION: If that's true, it doesn't much
8 matter whether you label it fact or opinion, does it?

9 MR. ENGLISH: Your Honor, I would agree with
10 you.

11 QUESTION: The question is whether you can prove
12 that it's false.

13 MR. ENGLISH: Clearly this Court in the Hepps
14 case has indicated, at least with reference to private
15 individuals on matters of public concern involving
16 newspapers -- which is exactly the situation that we have
17 here -- that it is the Plaintiff's burden to establish
18 without resort to presumptions that a particular statement
19 is false.

20 We believe that that can be demonstrated in this
21 instance without difficulty and, therefore, the action
22 should have been allowed to proceed and unquestionably it
23 should not have been protected by the First Amendment.

24 QUESTION: So -- so you would -- would accept as
25 a definition of opinion is something that cannot be proven

1 true or false?

2 MR. ENGLISH: Your Honor, I would say that that
3 is a fundamental aspect of the question of opinion. If
4 something cannot be proved true or false, I would suggest
5 to the Court that it could be properly labeled as opinion.

6 However, as Justice O'Connor has just mentioned,
7 it may not be necessary in this area of the law to even
8 adopt any kind of opinion privilege if we require a
9 defamation plaintiff to affirmatively prove falsity.

10 But in this case, the allegation is that Mr.
11 Milkovich lied under oath in a judicial proceeding. That
12 is quintessentially an assertion of fact which, if false,
13 should be actionable under the state law of defamation.

14 However, certain statements, which are very
15 rhetorical or hyperbolic or polemical, which cannot be
16 proved true or false, could easily be characterized as
17 opinion. However, it is the petitioner's judgement that
18 this Court need not reach that question in this case,
19 since based on the Hepps case, Mr. Milkovich can
20 demonstrate his entitlement to at least a jury
21 determination on the question of whether or not this --
22 these statements were true or false, and unquestionably
23 they were defamatory.

24 You Honors, as I have pointed out in my brief,
25 there are many instances in the past twenty years, after

1 this Court's decision in Gertz v. Robert Welch, were
2 courts have presumed that there is a broad First Amendment
3 based privilege in the law of defamation. As a result of
4 that presumption, and this Court has never so held, there
5 have been many courts that have developed a series of
6 different formulations as to how that distinction should
7 be made, whether something is an assertion of fact or
8 whether something is a expression of opinion.

9 Most courts have relied first on the question of
10 whether or not a statement is objectively verifiable. And
11 as I have pointed out in this instance, this statement is
12 unequivocally objectively verifiable.

13 This is not a situation like, for example, the
14 case Buckley v. Littell decided by the Second Circuit
15 where there was a statement that William F. Buckley was a,
16 quote, "fellow fascist traveler." In that case, the
17 Second Circuit looked at that language and said there is
18 no way that that statement can be in fact verifiable. It
19 is loosely defined words. It is polemical, it is
20 political in nature. And as a result, that statement is
21 not defamatory, or even if defamatory, is not actionable.

22 However, in the same case, Mr. Buckley was also
23 accused to having committed plagiarism. And the Second
24 Circuit analyzed that question and said that, very much
25 like perjury or an allegation of perjury, is definitely

1 empirically provable, clearly is defamatory, and therefore
2 should be actionable.

3 So the Second Circuit has certainly recognized
4 that there is an opinion privilege, but that opinion
5 privilege only applies in the area where there is very
6 polemical language, hyperbolae being utilized, and where
7 in context the statement cannot be objectively verified.

8 In this case, Your Honors, the respondents have
9 contended that this Court has no jurisdiction to decide
10 this case on the grounds that the Ohio Supreme Court has
11 determined that there is an opinion privilege under the
12 Ohio constitution. They cite the case of Michigan v.
13 Long, decided by this Court in 1983, for that proposition.
14 I would like to address that question directly because I
15 think it's important in the context.

16 The procedural history of this case is somewhat
17 unique. It has had 15 years of litigation in Ohio's
18 courts. There have been three attempts to bring this case
19 to the attention of the United States Supreme Court, the
20 latest and presumably only successful one, being the one
21 sought be the petitioner.

22 In Michigan v. Long this Court held that where a
23 state court has unequivocally determined an issue on
24 separate adequate and independent state grounds, this
25 Court does not have jurisdiction to decide the question.

1 However, in this case, the decision from which the appeal
2 is taken is from the Ohio Court of Appeals for the
3 Eleventh Appellate District, and not from the Ohio Supreme
4 Court. And the decision of the Ohio Court of Appeals from
5 the Eleventh Appellate District relies nearly exclusively
6 on Federal precedent and also relies on the decision of
7 the Ohio Supreme Court in the accompanying Scott case.

8 As the Court is aware, the Ohio Supreme Court in
9 -- in a period of yet -- just 15 months has determined, on
10 one hand, that the statements in question in this case are
11 constitutionally protected as opinion under the First
12 Amendment, and then 15 months later determined that the
13 very same statements under the very same facts, but with a
14 different plaintiff, are in fact constitutionally
15 protected or immunized by the First Amendment.

16 The Ohio Supreme Court did in fact mention on
17 two occasions in its -- in its decision that it was
18 relying in part on the Ohio constitution. However, any
19 fair reading of the Scott case clearly indicates that the
20 Ohio Supreme Court was primarily relying on this Court's
21 decision in Gertz against Robert Welch, decided in 1974,
22 and the veritable flood of cases that have been decided
23 since, presuming that there is this broad First Amendment-
24 based privilege. Therefore --

25 QUESTION: Is there -- are there any indication

1 on the Ohio cases that state law and First Amendment
2 Federal constitutional law are one and the same so far as
3 the definition of opinion?

4 MR. ENGLISH: Yes, Your Honor. There are a
5 number of old cases that hold that. However, there are no
6 cases that hold that the --

7 QUESTION: I mean, how -- not -- not, pre-New
8 York Times v. Sullivan, I assume?

9 MR. ENGLISH: They are -- they are pre-New York
10 Times v. Sullivan, basically standing for the proposition
11 that the Ohio constitution means essentially the same
12 thing as the First Amendment with respect to freedom of
13 the press.

14 The two provisions are roughly the same,
15 although, ironically enough, the Ohio constitution
16 expressly recognizes that there shall be free speech
17 subject to the right of protection of your reputational
18 interest if you are defamed. Whereas, obviously, the
19 First Amendment says nothing about the state law of
20 defamation.

21 The Ohio Supreme Court in this case -- in the
22 Scott case, merely relied in part on the Ohio
23 constitution, saying that it was a separate source of
24 authority but quite clearly under the analysis provided in
25 Michigan v. Long, which is frankly a very analogous to

1 this one, this Court has jurisdiction to decide the
2 question.

3 There are no Ohio cases known to the petitioner
4 that specifically hold that the first -- that the section
5 of the Ohio constitution, Article I, Section 11, provides
6 more protection for freedom of the press than does the
7 First Amendment to the Constitution.

8 QUESTION: Is the -- is the only language that
9 the Ohio Supreme Court used in Long that -- that justifies
10 the assertion of independent state grounds the phrase that
11 the ideals of the First Amendment are independently
12 reinforced in Section 11, Article I of the Ohio -- is
13 there --

14 MR. ENGLISH: There is -- I'm -- I'm sorry, Your
15 Honor. That is a statement, and then there is a statement
16 in Justice Locher's opinion for the court that says that
17 the Court is relying on the Ohio constitution as well as
18 the Federal Constitution. There is no question that the
19 Federal constitutional provision is very much interwoven
20 with the Ohio constitutional provision. And thus, it's
21 certainly Petitioner's view that this Court has
22 jurisdiction to decide the scope of, or even the
23 applicability of a First Amendment-based privilege.

24 Your Honors, if this Court adopts a First
25 Amendment-based opinion privilege, the Petitioner would

1 ask the Court to establish that privilege in a very narrow
2 manner and look to two primary objective factors, as
3 opposed to subjective factors on which the Ohio Supreme
4 Court relied in --

5 QUESTION: Is this -- is this is -- is this your
6 primary submission, Mr. English, or is your primary
7 submission that there really is no -- no need for a
8 separate First Amendment privilege for opinion?

9 MR. ENGLISH: Your Honor, I would say that under
10 the Hepps case, after the -- after the Hepps was decided
11 there is no need for a First Amendment-based privilege,
12 period.

13 However, if the Court acknowledges that a First
14 Amendment-based privilege is necessary in this area,
15 primarily because of the breathing space requirement that
16 the Court has recognized ever since New York Times v.
17 Sullivan, then that privilege should be very narrowly
18 drawn, and it should be objective factors.

19 Certainly one objective factor is whether or not
20 the statement is objectively verifiable, as Justice
21 O'Connor has pointed out, and certainly which is now a
22 requirement, constitutional requirement, based on the
23 Hepps case.

24 I would suggest --

25 QUESTION: Yeah, but Hepps -- in Hepps you still

1 have to -- before you give the jury -- before you --
2 before a plaintiff can undertake to prove something is
3 false it has to be provable, I guess.

4 MR. ENGLISH: That's correct, Your Honor.

5 QUESTION: So -- so you really don't solve much.
6 You still have to figure out whether something is
7 verifiable.

8 MR. ENGLISH: That's correct, Your Honor.
9 That's a fact question. And, obviously, if something is
10 not verifiable -- if the plaintiff cannot prove what the
11 statement is, the plaintiff, as I read the Hepps case,
12 cannot recover, period. And that's a requirement of the
13 First Amendment --

14 QUESTION: Well, then --

15 MR. ENGLISH: -- on speech of public concern.

16 QUESTION: Well, then, if it isn't verifiable,
17 it's opinion. So you get -- so you end up with the
18 same --

19 MR. ENGLISH: Your Honor --

20 QUESTION: -- the same result.

21 MR. ENGLISH: Your Honor, that -- that is the
22 position that I have advanced in the brief, and I believe
23 that that would adequately protect the competing interest
24 at stake.

25 This Court has long recognized that there's a --

1 there's certainly need for a vigorous robust free press.
2 But, however, there is also a need for an individual to be
3 able to recover for reputational damage. And in this
4 case, Mr. Milkovich has been attempting to do so for 15
5 years and has virtually every constitutional impediment
6 put in his way, and now we have the Supreme Court of Ohio
7 making a decision that on the basis that -- of essentially
8 misconstruing this Article and the specific allocations in
9 it, that this is somehow constitutionally protected
10 opinion.

11 You need only look at the article to determine
12 what in fact they alleged. The headline is Maple Beat the
13 Law with the "Big Lie." On the inside Diadiun says,
14 "Maple told a lie." Specifically, and I quote, "Anyone
15 who attended the meet, whether he be from Maple Heights,
16 Mentor, or impartial observer," those are the schools
17 involved, "knows in his heart that Milkovich and Scott
18 lied at the hearing after each having given his solemn
19 oath to tell the truth."

20 This is, Your Honors, quintessentially an
21 assertion of fact which, if false, is the proper subject
22 for a defamation claim.

23 QUESTION: May I ask you on that point, Mr.
24 English, you say it's quintessentially a question of fact,
25 but isn't it obvious that the author of the statement

1 could not possibly know as a matter of fact what everyone
2 who attended the meet knew in his heart? I mean, isn't
3 this like saying that I was at the meet, and I talked to a
4 lot of people and it's my opinion that everyone at the
5 meet must have had the same view that I had?

6 MR. ENGLISH: Your Honor, that's a very
7 different statement than what was said in here.

8 QUESTION: You think he saying as a matter of
9 fact he knows that everyone there knew in his heart that
10 he -- he --

11 MR. ENGLISH: No, I'm saying --

12 QUESTION: -- that's verifiable.

13 MR. ENGLISH: No, I'm not saying that. I think
14 that would be a misconstruction of the article. What Mr.
15 Diadiun has said is that everyone knows in his heart --
16 he's making this very fundamental thing -- everybody knows
17 that this man lied under oath, and he's specifically
18 asserting that. If you get yourself in a difficult --

19 QUESTION: Well, there are two different things
20 I'm suggesting. One is the difference between saying the
21 man lied under oath, and the second statement is that the
22 third party who was at the meet knows he lied under oath.

23 MR. ENGLISH: I agree. I agree. Except --

24 QUESTION: As to -- that's -- the latter half,
25 was that fact or opinion?

1 MR. ENGLISH: I would say that it depends on how
2 the article is written. But it could potentially be
3 opinion.

4 QUESTION: Well, I don't understand why you say
5 it depends on how -- it was written in English, I guess.

6 (Laughter.)

7 MR. ENGLISH: Well, I -- I'm not suggesting it
8 was written in Japanese, Your Honor, but --

9 QUESTION: (Inaudible)says that everyone knows
10 in his heart, that includes the speaker.

11 MR. ENGLISH: Yes, sir.

12 QUESTION: That includes the person.

13 MR. ENGLISH: No -- no question about that.

14 QUESTION: So that -- that general statement
15 subsumes a statement that I think he lied.

16 MR. ENGLISH: And that's exactly the gist or the
17 sting of the statement, that Mr. Milkovich lied under
18 oath. You can't read the headlines in this article and
19 the specific allegations --

20 QUESTION: So the statement that you're relying
21 on is -- is the portion of it which in substance says, I,
22 the author, know he lied.

23 MR. ENGLISH: That's correct.

24 QUESTION: And you -- you can disregard the fact
25 that everyone else thought he lied.

1 MR. ENGLISH: That's correct. What we really
2 have is sort of a mixed assertion of fact and commentary.
3 Part of the article is commentary, no question.

4 QUESTION: Would it be libelous if he'd said, I
5 believe he lied?

6 MR. ENGLISH: I don't believe so, Your Honor.
7 Justice -- Judge Friendly in Second Circuit noted in a
8 case that I call the Court's attention to -- it's Cianci
9 v. New Times Publishing -- a very capable analysis of how
10 it is that someone might be able to avoid this
11 opinion/fact distinction by saying, I think, I believe,
12 it's my constitutionally protected opinion that someone
13 lied under oath.

14 QUESTION: Wait. I'm sorry. You said --

15 QUESTION: And you'd agreed with that?

16 QUESTION: -- it would be libelous or it
17 wouldn't be libelous if he said I believe he lied?

18 MR. ENGLISH: It would be clearly libelous if he
19 said that. That would just be a ruse. It's just an
20 attempt to avoid what is quite obvious.

21 QUESTION: But you can't avoid it by saying in
22 my opinion he is a liar? I mean, that's the same thing as
23 saying he is a liar.

24 MR. ENGLISH: I think that is correct, Your
25 Honor.

1 QUESTION: Oh, I -- I thought you said the
2 opposite.

3 QUESTION: I think you did say the opposite.
4 Yeah, you had me going there.

5 MR. ENGLISH: I certainly didn't mean to do so.
6 (Laughter.)

7 QUESTION: Supposing he said this, I attended
8 the meeting and I saw these facts and I saw -- then
9 somebody else told me these facts; on the basis of these
10 facts, I think he lied?

11 MR. ENGLISH: Your Honor, that's a much closer
12 call. That would -- that would raise the opinion/fact
13 formulation at the restatement of tort second as to
14 what --

15 QUESTION: Well, what -- what do you do with
16 that case? He sets out all the facts on which he bases
17 the opinion and then he expresses -- he says, I think he
18 lied deliberately and committed perjury, which is a felony
19 in Ohio, and my reason for saying that is A, B, C and D,
20 which are all -- A, B, C and D are all accurate.
21 Actionable or not?

22 MR. ENGLISH: Actionable. I believe it would be
23 actionable. And obviously truth is a defense. If in fact
24 he relied on these individuals, and in fact Mr. Milkovich
25 lied under oath, then he obviously has nothing to worry

1 about. But if he didn't --

2 QUESTION: You don't agree with the restatement
3 second?

4 MR. ENGLISH: I do not agree with the
5 restatement second. I think it's way too narrow, and way
6 too --

7 QUESTION: You have to right not only about the
8 facts, but also about the assessment of the facts --

9 MR. ENGLISH: That's correct.

10 QUESTION: -- unless you can -- and the burden's
11 on you. But if you can prove to a jury that that
12 assessment of the facts is -- is not correct, it's libel.

13 MR. ENGLISH: That's correct. That is exactly
14 correct.

15 Your Honors, unless the Court has further
16 questions, I would like to reserve the remainder of my
17 time for rebuttal.

18 QUESTION: Very well, Mr. English.

19 Mr. Panza, we'll hear now from you.

20 ORAL ARGUMENT OF RICHARD D. PANZA

21 ON BEHALF OF THE RESPONDENTS

22 MR. PANZA: Mr. Chief Justice, and may it please
23 the Court:

24 I'd like to direct the Court's attention to what
25 Respondents initially believe to be an improvident grant

1 of the writ of certiorari. It is hard to imagine a --
2 absent a verbatim recitation of the language of Michigan
3 v. Long a clearer, more precise statement of independent
4 state law than set forth by the Ohio Supreme Court in the
5 Scott case.

6 QUESTION: In which opinion, Mr. Panza?

7 MR. PANZA: Scott case, 1986, Your Honor.

8 QUESTION: No. Which of the opinion of the
9 Supreme Court of Ohio?

10 MR. PANZA: There are only -- Your Honor, the
11 Scott case reversed the Milkovich case. Pursuant to Ohio
12 law, the Milkovich case, as a result of that reversal, has
13 a result of having never having existed. It has no legal
14 effect whatsoever.

15 QUESTION: But as I recall reading the Scott
16 case (inaudible), there wasn't just one opinion, there
17 were a number of different opinions by the justices of the
18 Supreme Court of Ohio.

19 MR. PANZA: Majority opinion, Your Honor.

20 QUESTION: The majority opinion?

21 MR. PANZA: Written by Judge Locher, who was
22 speaking for the majority.

23 QUESTION: But that's not the case we have
24 before us.

25 MR. PANZA: I beg your pardon?

1 QUESTION: That isn't -- that isn't the opinion
2 that is -- that is on appeal here.

3 MR. PANZA: That's absolutely correct, Your
4 Honor. But what was done by the Scott court, is to find
5 an independent adequate state remedy for --

6 QUESTION: Well, we -- we don't make an
7 independent inquiry into state law whenever we're
8 reviewing the judgment of a state court to determine
9 whether even though this state judge didn't rely on state
10 law, he could have --

11 MR. PANZA: Your Honor --

12 QUESTION: -- because, in fact, it is a matter
13 of state law. And that's what you're -- isn't that what
14 you're arguing about?

15 MR. PANZA: Not at all, Your Honor. The motion
16 for summary judgment -- the third motion for summary
17 judgement cited Scott for the proposition that there was a
18 state constitutional protection. And the Court --

19 QUESTION: I don't care what the motion for
20 summary judgment cited. I care what the opinion of the
21 court --

22 MR. PANZA: The court of appeals said the very
23 same thing, Your Honor.

24 QUESTION: What did the court of appeal say? It
25 cited Federal cases --

1 MR. PANZA: The court of -- the court of
2 appeals, in citing the Scott case, cited the proposition
3 that there is a -- a constitutional protection for -- for
4 this exact column pursuant to Article I, Section 11 of the
5 Ohio constitution.

6 QUESTION: It cited Federal cases and Scott. Is
7 that right? It cited both Federal cases and Scott. And
8 while Scott also relied on a state ground, Scott also
9 relied on a Federal ground, didn't it?

10 MR. PANZA: Your Honor, I believe exactly that
11 there was a separate paragraph that the court of appeals
12 made citing Article I, Section 11, and then the next
13 paragraph on cited the Gertz case.

14 QUESTION: Well, there might be a constitutional
15 rule in the state protecting this sort of thing, but if
16 the state just follows the Federal rule in applying -- in
17 construing its own constitution, I'm not sure that that is
18 an adequate independent state ground.

19 MR. PANZA: Well, I agree with you. It is not.
20 But that's not what was done in the Scott case.

21 In the Scott case, Your Honor, in the initial
22 summary conclusion of the Scott case where the -- the --
23 the critical opinion is set forth by the Ohio Supreme
24 Court, it holds quite clearly, without reference to the
25 First Amendment, that there is a constitutional protection

1 for opinion under Article I, Section 11.

2 It then goes three paragraphs down and finds
3 that the ideals of free press and free speech are at the
4 core values of Article I, Section 11. And then it uses
5 the word "independently of" or independently of the First
6 Amendment of the United States.

7 QUESTION: Is there any case precedent in the
8 State of Ohio which undertakes to analyze defamation
9 issues separately under state law and reject contrary to
10 result to what the Federal Law reaches?

11 MR. PANZA: Not since the Scott case, Your
12 Honor, but I might point out to you that the Ohio Supreme
13 Court one year later in the case of Lansdown once again
14 reiterated that the -- there was a constitutional
15 protection, a state constitutional protection, for opinion
16 independent of the Federal Constitution. One year later.

17 QUESTION: Mr. Panza --

18 MR. PANZA: Yes, Your Honor.

19 QUESTION: Mr. Panza, would you help me on one
20 matter. I can't find it right now, there's so darned many
21 opinions in these two volumes here, I can't find it. But
22 the Scott Supreme Opinion -- maybe you'll give me the page
23 of it if it's handy -- but the syllabus of the Scott
24 opinion, as I remember it, does not differentiate between
25 the Federal and the state constitution.

1 MR. PANZA: Doesn't say it either.

2 QUESTION: And isn't it the syllabus that's the
3 law in Ohio, rather than the opinion?

4 MR. PANZA: That's absolutely correct.

5 QUESTION: So if the syllabus does not contain
6 an independent adequate statement they're relying on a
7 state ground rather than Federal, isn't that the end of
8 the ball game?

9 MR. PANZA: Well, I don't believe so, Your
10 Honor, because the syllabus doesn't say -- doesn't cite to
11 the Federal Constitution, nor does it cite to the Ohio --

12 QUESTION: Right.

13 MR. PANZA: -- Supreme Court. So you must go
14 into the heart of opinion to try to make a determination
15 as to -- as to whether or not there's independent adequate
16 state grounds. Actually, you must go into the opinion to
17 try and determine what the Ohio Supreme Court meant by
18 making that citation.

19 QUESTION: There is --

20 MR. PANZA: But there is no reference, one way
21 or another. You're quite correct.

22 QUESTION: All right.

23 QUESTION: Could -- could you tell me which is
24 the opinion of the court of appeals that we're reviewing
25 here in your appendix? In the joint appendix? Just give

1 me a page.

2 MR. PANZA: Page 108.

3 QUESTION: 108. Thank you.

4 MR. PANZA: I'd like to address myself now to
5 Justice O'Connor's comments concerning why Respondent
6 believes that Hepps in no way is sufficient to protect
7 opinion if the purpose of the protected speech is to
8 advance public debate. And I believe what Mr. English has
9 been talking about for 15 minutes is -- is a test known as
10 the verifiability test.

11 The problem with the verifiability test and
12 because, of course, we know Hepps doesn't direct us to any
13 test whatsoever -- I'm not sure it was intended to do that
14 -- but implicitly, by shifting the burden to the
15 plaintiff, it necessitates the verifiability test.

16 The problem with the verifiability test is that
17 it protects only speech which is figurative and so
18 hyperbolic that it is absolutely false. This is speech
19 which does very little to advance public debate. The
20 problem with the verifiability test is that it tends to
21 eliminate as -- it tends to eliminate the vast body of
22 opinion that may be based on certain facts, which may or
23 may not be -- be proven true.

24 It is that -- that debate, it is that opinion,
25 such as the opinion in this case, that advances public

1 debate. By allowing Hepps to stand without any other
2 constitutional protection you are in effect excluding a
3 substantial amount of opinion.

4 QUESTION: Well, supposing in this case Mr.
5 Diadiun had said, in my opinion Milkovich perjured
6 himself. Do you think that should be actionable if it can
7 be proved false?

8 MR. PANZA: I don't think Mr. Diadiun's
9 intentions have -- are relevant.

10 QUESTION: Well, can you answer my question?

11 MR. PANZA: Yes, I can.

12 QUESTION: Why don't you?

13 MR. PANZA: I will. If -- if the article can be
14 perceived as the opinion of the speaker -- in this case
15 the opinion --

16 QUESTION: Well, I'm -- I'm asking you
17 hypothetical question, Mr. Panza, that doesn't necessarily
18 depend on the article. Do you want me to repeat my
19 question?

20 MR. PANZA: I think what you're asking me, Your
21 Honor, if I'm -- if -- is if Mr. Diadiun merely said, I
22 think, and then referred to a certain set of factual
23 scenarios.

24 QUESTION: If he said, in my opinion Milkovich
25 committed perjury, is that -- should that be -- should

1 there be no action because the First Amendment -- even if
2 -- even if Milkovich cannot prove he did not commit
3 perjury?

4 MR. PANZA: If it is opinion, and if it
5 concerns --

6 QUESTION: Well, answer -- can you answer my
7 question yes or no?

8 MR. PANZA: Yes, it should be protected, Your
9 Honor.

10 QUESTION: That should be protected?

11 MR. PANZA: Absolutely, Your Honor.

12 QUESTION: And suppose that the words, "in my
13 opinion," were left out? He just says, Mr. Milkovich lied
14 under oath?

15 MR. PANZA: No, then that would sound like a --
16 an objective factual dissertation of the legal effect of
17 Mr. Milkovich's testimony.

18 QUESTION: And that would be actionable in your
19 view?

20 MR. PANZA: If it was perceived as an
21 objectionable -- or, excuse me, an objective recitation of
22 the facts, yes.

23 QUESTION: Do you -- do you then --

24 MR. PANZA: That's not the case here.

25 QUESTION: Is it -- is it good reporting,

1 therefore, to -- in your view -- under your view of the
2 case, to preface statements of fact with the words "in my
3 opinion" in order to immunize yourself --

4 MR. PANZA: Absolutely not.

5 QUESTION: -- from responsibility?

6 MR. PANZA: Absolutely not, and that's not what
7 was done here. Absolutely -- and that is not good
8 reporting.

9 QUESTION: So that would be bad reporting?

10 MR. PANZA: I would absolutely say so.

11 QUESTION: Well, but that -- that's a very handy
12 device. I assume that all book publishers can just put on
13 the first page everything contained in this book is, of
14 course, the opinion of the writer. And then you can go on
15 and say anything you like.

16 MR. PANZA: Justice Scalia --

17 QUESTION: And there's no liability for libel at
18 all. And all newspapers can have on their masthead,
19 everything here is the opinion of the people who write it.

20 MR. PANZA: Justice Scalia --

21 QUESTION: And there's no such thing as libel.

22 MR. PANZA: I'm not -- I'm not a proponent of
23 that.

24 QUESTION: I thought you were.

25 MR. PANZA Not at all.

1 QUESTION: In your response to the --

2 MR. PANZA: Not at all.

3 QUESTION: -- to the Chief --

4 MR. PANZA: Not at all. Not at all. I believe
5 what is or is not opinion has to be analyzed by the
6 context of what was said, not by two or three or maybe
7 four facts in the statement upon which the context is
8 based. By the entire context.

9 I think the restatement of tort second solves
10 the problem of saying I think, and then going through a
11 recitation of facts. And I don't -- and I am not up here
12 asking the Court to -- to agree that merely by putting
13 some mystical words "I think" and then reciting objective
14 fact you can protect all that fact. Absolutely not.

15 QUESTION: Well, then, you're qualifying the
16 answer you gave to the Chief Justice earlier?

17 MR. PANZA: No, I'm not qualifying at all. I
18 had to be --

19 QUESTION: I mean, it's not clear --

20 MR. PANZA: I couldn't explain --

21 QUESTION: -- to me what your position is. So
22 suppose that's all the statement. It's just the one
23 sentence in the big headline, in my view, in my opinion,
24 Milkovich committed perjury. That's all.

25 MR. PANZA: If the reader perceives that as

1 opinion, then -- then that is protected. And to the
2 extent that it -- that it is engaged in public debate, it
3 is protected. That is -- that is the answer to the Chief
4 Justice. Or in -- in--

5 QUESTION: Well, shouldn't that be a jury
6 question?

7 MR. PANZA: Absolutely not.

8 QUESTION: When you say -- when you say if the
9 reader perceives it as opinion, is that a question that a
10 -- that a court decides without -- as a matter of law?

11 MR. PANZA: Yes, it is. I'm sorry.

12 QUESTION: Why?

13 MR. PANZA: Why?

14 QUESTION: ~~I mean~~, why shouldn't it be a
15 question of fact if you're talking about the perception of
16 a reader?

17 MR. PANZA: If you will -- I'm -- thank you,
18 Your Honor. If you allow a jury to decide that question,
19 you will be promoting self-censorship and not public
20 debate. If, in fact, newspapers will be left to the
21 uncertainty of jury conclusions in regards to an analysis
22 of whether or not their opinion may contain certain facts
23 which can or cannot be proven true or false out of
24 context, they won't write the opinion. And, as a result,
25 public debate will suffer.

1 QUESTION: So -- so the question of how this --
2 how the statement is perceived is not a question of fact,
3 but it's a question of law that's decided by the court?

4 MR. PANZA: Yes, Your Honor.

5 QUESTION: And how -- how does the court go
6 about deciding that?

7 MR. PANZA: Well, it has to use a test and it
8 has to adopt a test. And there are many tests that we set
9 forth in our brief.

10 The one we are a proponent of is pretty much the
11 test used in the Scott Court in 1986. And that is, the
12 Ollman test, as modified by the Seventh Circuit in the
13 Potomac Valve case. It takes into consideration the
14 meaning of the words, it takes into consideration whether
15 or not the particular factual assertion is verifiable, if
16 it is a factual assertion. It takes into consideration
17 the internal and external context of the entire opinion.

18 And the entire opinion is important here, Your
19 Honor, because the speaker, Diadiun, never said Mike
20 Milkovich committed perjury. It had nothing to do with
21 his opinion. It is a statement totally taken out of
22 context which -- the point I'm trying to make in regards
23 to verifiability -- doesn't do justice to his opinion.

24 QUESTION: Well, it -- it's one thing to say he
25 never said it, and it's another thing to say -- to say

1 that he said it, that was taken out of context. Do you
2 mean literally he never said it?

3 MR. PANZA: He never said he committed perjury.
4 What he said was, I think, is what Mr. English read to
5 you. And, that is, everyone who was in attendance at the
6 meet, be he a partial or impartial observer, knows in his
7 heart that Mr. Milkovich lied after having given his
8 solemn oath to tell the truth.

9 QUESTION: That's not saying he committed
10 perjury.

11 MR. PANZA: I think -- I think -- I think if you
12 isolate that and if you have a lawyer look at it, he will
13 conclude it constitutes perjury. I think if you review
14 that statement in the entire context of the article, you
15 will understand that it has very little to do with an
16 accusation of perjury.

17 Your Honor, I submit to you, if Ted Diadiun
18 wanted to accuse Michael Milkovich of perjury, he would
19 have published this article after the OHSAA hearing
20 because, if you'll remember, in the article he said he
21 believed that Mr. Milkovich misrepresented the facts in
22 that hearing.

23 If he wanted to accuse him of perjury, Your
24 Honor, I submit he would have published an article on
25 November 9th, 1974 after he had his conversation with

1 Harold Meyer because it was at that time that he believed
2 Milkovich had lied under oath.

3 The reason why he waited two months later, Your
4 Honor, is because the point -- the very point that Mr.
5 Diadiun is making in the article, and that is, educators,
6 motivators of youth who refuse to accept responsibility
7 for their action, that's what constitutes a lie. And if
8 they get away with it, that sets a poor example for the
9 students they teach. That is what Ted Diadiun is saying,
10 Your Honor.

11 QUESTION: Mr. Panza, let me -- let me
12 understand your position. It is perfectly all right, I
13 take it, if I say, in my opinion so and so is a child
14 abuser; I don't have a whole lot of facts to go on but
15 that's my opinion. I can say that and that is not
16 libelous?

17 MR. PANZA: Well, I can imagine that there are
18 scurrilous forms of opinion that this Court may not choose
19 to extend constitutional protection to. And that's not my
20 case. And I -- I can understand that.

21 QUESTION: Oh, the difference is between calling
22 someone a -- a child abuser and a perjurer? Is that --
23 we're going to --

24 MR. PANZA: No, no.

25 QUESTION: -- different classifications of -- of

1 libel?

2 MR. PANZA: No. It still may be opinion, Your
3 Honor. It still may be opinion, but whether or not you
4 want to extend constitutional protection for that
5 particular form of opinion --

6 QUESTION: You're -- you're -- you're suggesting
7 to us that we have different categories of subjects, some
8 of which are protected and some of which are not? That's
9 the position of your newspaper?

10 MR. PANZA: No. What I'm -- what I am proposing
11 to you, Justice Kennedy, is that since the New York Times
12 case you have chosen to protect certain forms of speech
13 which -- which promote public debate. This should be no
14 exception to that rule. That's what I'm proposing.

15 QUESTION: Are -- are you seeking to distinguish
16 between an acquisition that someone is a perjurer and
17 someone is a child abuser?

18 MR. PANZA: Gee, I don't think so, Your Honor.
19 I'm -- I'm -- I'm telling you -- the way I'm answering the
20 question is that I could imagine, with facts unrelated to
21 my own, that there may be certain forms of private opinion
22 submitted in situations that do not concern social
23 controversy that this Court may choose not to protect.
24 Not because --

25 QUESTION: Well, this -- .

1 MR. PANZA: Not because --

2 QUESTION: This man -- this man was an educator.

3 I -- I would think that Justice Scalia's hypothetical --
4 if a statement like that had been made by an educator, I
5 can hear some newspaper arguing that this is very, very
6 relevant for social purposes.

7 MR. PANZA: Oh, and it absolutely is, if that's
8 the scenario.

9 QUESTION: It -- it would be all right? I mean,
10 that was just -- that was just a lead in.

11 MR. PANZA: If a man --

12 QUESTION: I thought you were going to say for
13 sure yes to that.

14 MR. PANZA: If a man is an educator --

15 QUESTION: That wasn't a real question.

16 (Laughter.)

17 QUESTION: I'm getting to the real question. I
18 assume if you can say that, you can also say -- if you can
19 prove it to be true -- 90 percent of the people in his
20 office think that he's a child abuser. So long as you can
21 prove that it is indeed the fact that is the opinion of 90
22 percent of the people in his office that he's a child
23 abuser, I assume that you could say that as well.

24 MR. PANZA: Well, if it goes to his
25 qualifications --

1 QUESTION: Doesn't it trouble you that people's
2 reputations without any ability to defend it can be
3 destroyed this way?

4 MR. PANZA: Well, of course, it does. Of course
5 it does.

6 QUESTION: Well, what's your solution?

7 MR. PANZA: Well, first, I think you have to
8 analyze what is being said. I think that's the first
9 thing you have to do. And -- and if it is -- if what is
10 being said is opinion, then the -- then you next must
11 determine whether or not it is in a public or social
12 controversy.

13 If it concerns a teacher who teaches children,
14 then I think it may be relevant. And if it is truly
15 opinion, yes, it may be protected. If it is an educator
16 who teaches children how to wrestle and his qualifications
17 are called into question because the -- the people that he
18 coached beat other people, then I think, yes, his
19 qualifications may be in question.

20 QUESTION: Your answer to my question is, yes,
21 you could publish in your paper 90 percent of the teachers
22 in so and so school think that he's a child abuser and
23 that is not libelous?

24 MR. PANZA: With the qualifications as I've
25 answered the Court's question.

1 QUESTION: Mr. Panza, do you agree with the
2 petitioner that this case is governed -- falls within the
3 Hepps' holding? That it's speech about a matter of public
4 concern?

5 MR. PANZA: Oh, without question. I do agree
6 with that.

7 QUESTION: All right. And why is it that you
8 think that the allegation that someone lied under oath
9 isn't something that the plaintiff could try to prove is
10 false? It would seem to me that's -- that's a statement
11 that can be proven true or false.

12 MR. PANZA: Absolutely right, it can be proven
13 true or false. But --

14 QUESTION: And why shouldn't we let that go to
15 the jury and let them have their chance?

16 MR. PANZA: Well, if you're dealing with this
17 article, that's not what Mr. Diadiun said. That isn't his
18 opinion. The point I'm trying to make is that --

19 QUESTION: What if the conclusion of the jury is
20 that the reasonable average reader would have understood
21 this article as saying the plaintiff lied under oath?

22 MR. PANZA: Well, if the Court has ruled that it
23 -- it has to go to the jury, but I'm not a proponent of
24 submitting it to the jury for the reasons I've -- I've
25 outlined to the Court. And I'm certainly --

1 First of all, this case is impossible to submit
2 to a jury. There is no transcript of the Ohio High School
3 Athletic Association. You would probably literally be
4 required to call virtually every witness who attended it
5 in order to -- to give his or her opinion as to whether or
6 not Milkovich lied under oath.

7 QUESTION: Well, the plaintiff says they're not
8 interested in the statement about what other people think.
9 They're only interested in the allegation that the
10 plaintiff lied under oath.

11 MR. PANZA: Well, I think -- I think the
12 Plaintiff is very interested in -- in -- in fostering onto
13 the Court that that is the opinion of Mr. Diadiun when he
14 wrote the article. But it isn't.

15 It may be a fact upon which he relied. I mean,
16 there is absolutely -- there is absolutely no doubt that -
17 - that statement is in the article, but --

18 QUESTION: Shouldn't it turn on what the average
19 reasonable reader of the article would think was being
20 said?

21 MR. PANZA: Absolutely, yes.

22 QUESTION: Yes.

23 MR. PANZA: Absolutely, yes.

24 QUESTION: Okay.

25 QUESTION: May I give you a hard hypothetical?

1 Supposing in this case the fact of the matter was that Mr.
2 Milkovich never even testified at the hearing and that the
3 author of the article knew that and nevertheless wrote the
4 same article?

5 MR. PANZA: I would submit to you, Justice
6 Stevens, that, as I pointed out before, I do not see that
7 the speaker's intention is in any way relevant.

8 QUESTION: Well, just under --

9 MR. PANZA: What is relevant --

10 QUESTION: -- under the actual malice standard
11 he knew the statement was false when he made it. That's
12 all.

13 MR. PANZA: Well --

14 QUESTION: But -- but that would be irrelevant?
15 But it -- it's so clearly provable that he -- that he did
16 make -- you'd still say that protected in my hypothetical,
17 in other words?

18 MR. PANZA: Yes, sir.

19 QUESTION: Yeah.

20 QUESTION: Could I ask you another --

21 MR. PANZA: Sure.

22 QUESTION: Your response earlier to Justice
23 Kennedy and me said that -- the -- suggested that the
24 fact/opinion dichotomy only applies if it's a matter of -
25 - of public concern. I -- I hadn't understood your

1 position to be that. I thought that the -- and the courts
2 that have applied that reasoning, I thought they apply it
3 to all -- all defamation actions, not just those that
4 relate to matters of public concern. Is that right or
5 wrong?

6 MR. PANZA: First of all, you're absolutely
7 correct. The -- the lower courts that -- that apply this
8 principle generally apply that it applies to individuals
9 engaged in private situations or --

10 QUESTION: Right. So if I said somebody was --
11 in my opinion he's a lousy carpenter, that -- that would
12 also be immune because he --

13 MR. PANZA: Under that -- under that principle.
14 But that's not the principle that I'm -- that I'm
15 requesting from the Court. Those aren't the facts of my
16 case.

17 My case concerns a -- a public controversy, a
18 social controversy. These are real communities. Mentor,
19 a neighboring community 23 miles away, had four of its
20 wrestlers beaten up. They were concerned about the safety
21 of their children. They went demanding an answer to the
22 OHSAA.

23 These -- these things that Mr. Diadiun discusses
24 were of major concern to that local community. There was
25 tremendous disagreement after the OHSAA resolution and the

1 imposition of a severe censorship. When --

2 QUESTION: Let's see what this proves. It
3 proves that you want to get to the truth. And the issue
4 is whether you're likely to get to the truth in a society
5 when you allow the most outrageous version of things to be
6 published so long as it's somebody's opinion.

7 Do you really think that it's going to help the
8 search for truth to allow the most false things to be said
9 so long as they're said as opinions without any recourse?

10 MR. PANZA: Well, I guess there's the problem.
11 The most false things probably, if they can be proven
12 false in their factual assertions -- and I know it's a
13 difficult concept because -- because what I think you
14 first must do is analyze whether or not under the proper
15 test is fact or opinion. Not just simply with are there
16 some facts in it which I can prove true or false but what
17 is the speaker saying? Is it -- and does the reader
18 perceive it as the speakers attitudes?

19 And if he does, and if it concerns a matter of
20 public controversy, then it should be protected. Why?
21 Because it promotes social and public debate. Will you
22 inevitably, as a result of that rule, protect some speech
23 that shouldn't be protected? Quite probably.

24 QUESTION: If the speaker goes on, or the writer
25 goes on for 10 or 12 column inches, isn't it conceivable

1 he may be saying several different things?

2 MR. PANZA: Sure, it is.

3 QUESTION: And might not one of them in this
4 case be that Mr. Milkovich perjured himself?

5 MR. PANZA: Well, it might be, but I don't
6 believe that in this case you can separate that particular
7 statement from the rest of what Mr. Diadiun is saying.

8 QUESTION: Why can't you?

9 MR. PANZA: Well, because it is part and parcel
10 of -- of the general opinion that failing to take
11 responsibility is in fact a lie. There's no doubt he --
12 Mr. Diadiun said Mr. Milkovich was lying. But he never
13 meant to say that -- he never meant to make a legal
14 commentary on the -- or objective analysis of the legal
15 effect of Michael Milkovich's testimony in his sports
16 column.

17 QUESTION: So in a sports column, unless you
18 really mean to say that someone perjured themselves, it -
19 - it's okay?

20 MR. PANZA: No. No. In a sports column people
21 read -- when people read sports columns, they read it
22 understanding that they're going in many instances to read
23 opinion. That is different --

24 QUESTION: I gave up reading the sport column
25 because it had nothing but legal news, antitrust, contract

1 breach --

2 (Laughter.)

3 MR. PANZA: Sports columnists tend to be very
4 opinionated, Justice Kennedy, and when you read them, you
5 read them -- when you read what they say, you read what
6 they say with the understanding that they are opinionated.
7 That's all I mean to say.

8 Respondent believes that this article is
9 constitutionally protected opinion. If this Court
10 concludes that it is fact, I would ask you to note that
11 three separate trial courts have found Mr. Milkovich to be
12 a public figure, and/or a public official. No court has
13 ever found any clear and convincing evidence of actual
14 malice.

15 I would ask you, then, to put an end to 15 years
16 of litigation and affirm.

17 Thank you.

18 QUESTION: Thank you, Mr. Panza.

19 Mr. English, you have 12 minutes remaining.

20 REBUTTAL ARGUMENT OF BRENT LAWSON ENGLISH

21 ON BEHALF OF THE PETITIONER

22 MR. ENGLISH: Thank you, Your Honor.

23 I'd like to address the last point that Mr.
24 Panza just made because I think it is a complete
25 misstatement of the facts and the law in this case.

1 The Ohio Supreme Court on December 31, 1984 made
2 a determination in this case that Mike Milkovich was not a
3 public figure and not a public official and that this
4 statement was not constitutionally protected as opinion.
5 That is the law of this case.

6 There has not been a determination by any other
7 court since that time that Mike Milkovich is not a public
8 figure and not a public official. The respondents would
9 have this Court believe that somehow the Ohio Supreme
10 Court, by deciding the Scott case, has somehow sub
11 silentio overruled it's prior decision with respect to Mr.
12 Milkovich.

13 Mr. Milkovich's status --

14 QUESTION: But it did -- it did come out a
15 different way in Scott on some issues than it did in the
16 Milkovich case, didn't it?

17 MR. ENGLISH: Without a doubt. With respect to
18 the opinion question, there has been a complete flip-
19 flop. The decision was four to three in the Milkovich
20 case in favor of making the article actionable, i.e., an
21 assertion of fact, and it was four to three in the Scott
22 case just 15 months later after two judges on the Ohio
23 Supreme Court left the Court and two new judges joined the
24 Court.

25 There have been now new judges elected to the

1 Ohio Supreme Court, and it's unclear, certainly, as to
2 what might happen with this question unless this Court
3 definitively decides that this article is not
4 constitutionally protected as opinion.

5 QUESTION: We couldn't decide it for the --
6 under the -- we couldn't decide what the Ohio Constitution
7 requires or not.

8 MR. ENGLISH: That is correct, Your Honor, you
9 could not. However, going to that question with the
10 Michigan v. Long analysis of separate adequate independent
11 state grounds, as Justice Scalia pointed out, the decision
12 from which the appeal is being taken is from the Ohio
13 Court of Appeals, and there is a specific determination
14 there that the court is relying on Federal precedent.

15 Clearly, the Ohio Supreme Court, again, as
16 Justice Stevens pointed out, depends on the syllabus in
17 the opinion, and the syllabus no way mentions that the
18 case is grounded either in whole or in part on the Ohio
19 constitution.

20 Every justice of the Ohio Supreme Court wrote on
21 the Scott case, and all but one of the concurring judges
22 in the majority cited the Federal Constitution as being
23 the source for the opinion privilege.

24 QUESTION: Mr. English, unless there are further
25 questions from the Court on that point, I think -- I think

1 you can consider that we -- we have it.

2 MR. ENGLISH: Fine. Thank you, Your Honor.

3 I have one last question, or one last point on
4 rebuttal. Mr. Panza has continued to note here that the
5 issue is not what Mr. Diadiun intended but, rather, what
6 the average reasonable newspaper reader perceived. And I
7 would agree with that point.

8 However, in his next breath he says Mr. Diadiun
9 really didn't intend to say that Mike Milkovich committed
10 the crime of perjury. The relevant constitutional inquiry
11 should be how is an average reader perceiving the article,
12 as Justice O'Connor pointed out. And on that score, a
13 reasonable construction of the article in this case can
14 lead to but no other reasonable conclusion than that Mr.
15 Milkovich was accused of a crime under Ohio law.

16 QUESTION: But do you think that's the test
17 rather than verifiability?

18 MR. ENGLISH: No, Your Honor. I think that
19 verifiability obviously will -- will get us past that
20 problem. But if, for instance, there is a reasonable
21 dispute as to whether verifiability is in question -- in
22 other words, we have a mixed question of opinion and fact
23 -- then the relevant inquiry should be how does the
24 average reader perceive the question.

25 QUESTION: Is that an issue that's submitted to

1 the jury, the perception of the average reader? Or is
2 that for the court --

3 MR. ENGLISH: Your Honor, I believe it is a
4 question reasonably left to the jury. There is no
5 reasonable justification for making it a legal question.

6 It's not like the determination of whether an
7 individuals a public figure or public official. But,
8 rather, it goes to how did a reasonable reader perceive
9 this. And what better group to make that decision than a
10 jury.

11 And I would submit to the Court that, in this,
12 case since there was a jury demand, the jury could easily
13 make that determination and decide whether or not Mr.
14 Diadiun's intent or the average perception of the
15 newspaper -- or the newspaper audience, was whether he
16 accused Mr. Milkovich of perjury or merely was stating
17 this as his alleged opinion.

18 For all of the reasons I've mentioned,
19 Petitioner respectfully requests that the Court reverse
20 the decision of the Ohio Court of Appeals and return this
21 case for trial.

22 Thank you.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
24 English.

25 The case is submitted.

1 (Whereupon, at 11:59 a.m., the case in the
2 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 89-645 - MICHAEL MILKOVICH, SR., Petitioner V. LORAIN JOURNAL CO., ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Lona M. May*

(REPORTER)

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