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**TORTS—AVIATION SAFETY RATINGS AS DEFAMATION:
AVIATION CHARTER, INC. V. AVIATION RESEARCH GROUP/US**

LISA NORMAND*

IN THE RECENT CASE of *Aviation Charter, Inc. v. Aviation Research Group/US*,¹ the U.S. Court of Appeals for the Eighth Circuit held that the First Amendment protected an aviation safety rating published in a newspaper article because it was a subjective assessment incapable of being proved true or false. While a state may choose to extend protection to the safety rating published in this case,² the First Amendment does not require such a result. The Eighth Circuit too narrowly construes the Supreme Court's holding that an opinion can imply a false assertion of fact in the seminal case analyzing opinion as defamation, *Milkovich v. Lorain Journal Co.*³

Aviation Research Group/US ("ARGUS"), a private firm that researches and publishes safety ratings of air charter service providers, assigned Aviation Charter its lowest possible rating.⁴ After Senator Paul Wellstone and seven others died in an Aviation Charter crash, the *Minneapolis Star Tribune* published an article referring to the poor safety rating and quoting ARGUS's president.⁵ Aviation Charter sued ARGUS for defamation and for violations of the Lanham Act and the Minnesota Deceptive Trade Practices Act ("MDTPA").⁶

Aviation Charter claimed there were significant problems with ARGUS's methodology.⁷ It contended that Mark Fisher, who

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¹ 416 F.3d 864, 871 (8th Cir. 2005).

² See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 15 (1990) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

³ See *Milkovich*, 497 U.S. at 18-19.

⁴ *Aviation Charter*, 416 F.3d at 867.

⁵ *Id.*

⁶ *Id.* at 866.

⁷ Appellant's Brief and Addendum at 3, *Aviation Charter, Inc. v. Aviation Research Group/US*, 416 F.3d 864 (8th Cir. 2005) (No. 04-3040).

developed ARGUS's method for comparing safety of aviation charter services, "had no formal education, training, or experience in the field of statistics" and "no formal education in the field of aviation safety."⁸ Fisher relied on accident and incident reports in National Transportation Safety Board ("NTSB") and Federal Aviation Administration ("FAA") databases for calculating the safety ratings.⁹ Dr. Luxhoj, the expert ARGUS hired to analyze its formula, identified several problems with ARGUS's scoring method.¹⁰

First, Dr. Luxhoj "provided ARGUS with scientific studies establishing that the databases ARGUS relied on were not predictors of safety"¹¹ One reason for this is that the databases include "incident reports," which do not necessarily raise a safety issue.¹² That reports of "past incidents may actually lead to a safer operator" and that the databases rely on self-reporting were other reasons Dr. Luxhoj gave for why the databases do not sufficiently predict safety.¹³ Second, the raw numbers of incident and accident reports were not "normalized" before being used to calculate safety ratings.¹⁴ Normalization, the process by which raw numbers are converted into rates, is required before comparisons can be made, since larger carriers with more frequent flights are likely to have more incident and accident reports.¹⁵ Third, Dr. Luxhoj concluded that grouping carriers by size, as ARGUS did, is not statistically defensible because there are significant variables within each group.¹⁶ Finally, Dr. Luxhoj complained that ARGUS added the scores derived from the two databases together to arrive at a total score without taking into account the frequency of records from each database.¹⁷ This is significant because one database covers less serious, more frequent records, while the other database covers more serious, less frequent records.¹⁸

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.* at 7.

¹¹ *Id.*

¹² *Id.* at 8-9.

¹³ *Id.* at 9.

¹⁴ *Id.* at 10.

¹⁵ *Id.*

¹⁶ *Id.* at 10-11.

¹⁷ *Id.* at 11.

¹⁸ *Id.*

Aviation Charter claimed ARGUS disregarded Dr. Luxhoj's findings and proceeded to publish the unfavorable rating.¹⁹ To bolster its claim that ARGUS's rating was erroneous, Aviation Charter claimed an independent aviation safety auditor ranked Aviation Charter as one of the best it had ever seen.²⁰

The U.S. District Court for the District of Minnesota granted ARGUS's summary judgment motion on the defamation claim because it concluded that Aviation Charter had failed to establish a genuine issue of material fact that ARGUS acted with malice.²¹ The district court also held that the safety rating was "a provably false factual connotation, and thus defamatory in nature."²² The district court relied on the U.S. Supreme Court's holding in *Milkovich*, in which the Court refused to expand First Amendment protection to include all opinion because "expressions of opinions often embrace 'an assertion of objective fact.'"²³

In discussing its holding that the safety rating was, in fact, defamatory, the district court cited another case it had previously decided.²⁴ In *Landers v. National Railroad Passenger Corp.*,²⁵ an employee who was fired after receiving a poor performance rating sued his employer for defamation, breach of contract, and disability discrimination. Regarding the defamation claim, the employer argued that the rating could not be defamatory because it was not susceptible to being proved true or false.²⁶ In support of its argument, the employer relied on a Minnesota Court of Appeals case, *McGrath v. TCF Bank Savings, FSB*, which held that "a manager calling an employee a 'troublemaker' was not defamatory because the phrase failed to suggest verifiably false facts about the employee."²⁷ The district court in *Landers* rejected the employer's argument because it found *McGrath* was distinguishable: "While the term 'troublemaker' standing alone

¹⁹ *Id.* at 12-13.

²⁰ *Id.* at 3.

²¹ *Aviation Charter, Inc., v. Aviation Research Group/US*, No. 03-2439, 2004 U.S. Dist. LEXIS 14132, at *14 (D. Minn. Jul. 10, 2004).

²² *Id.* at *11.

²³ *Id.* at *8 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990)).

²⁴ *Id.* at *10-11.

²⁵ No. 00-2233, 2001 U.S. Dist. LEXIS 22023, at *1, 5-6 (D. Minn. Dec. 28, 2001).

²⁶ *Id.* at *16 (noting the employer was "relying on the axiomatic distinction between opinions and facts").

²⁷ *Id.* (referring to *McGrath v. TCF Bank Sav., FSB*, 502 N.W.2d 801, 808 (Minn. Ct. App. 1993)).

might not have been sufficiently tethered to specific facts to constitute defamation, the numerical ratings at issue in this case are tied to particular facts about [the employee's] performance."²⁸

The Eighth Circuit upheld the district court's grant of summary judgment to ARGUS on the defamation claim, but on different grounds.²⁹ The court never reached the issue of actual malice.³⁰ Instead, it concluded that the rating was not defamatory because it was not an "objectively verifiable fact," thereby overruling the district court's conclusion that the rating was capable of being proved false.³¹

While Aviation Charter claimed seven statements in the *Minneapolis Star Tribune* article constituted defamation, the Eighth Circuit focused on the comparison implicit in the safety rating itself, explaining that the other statements were derivative of the rating.³² The comparison implicit in the rating was that "Aviation Charter, relative to other carriers of its size, has an unfavorable safety record."³³ The court explained that if the comparison was not defamatory, then the statements derivative of the rating were not defamatory.³⁴

The Eighth Circuit, like the district court, relied on *Milkovich* in its holding.³⁵ In *Milkovich*, a former high school wrestling coach sued a newspaper for publishing an article that suggested he lied under oath in a hearing regarding his team's involvement in an altercation.³⁶ The Court in *Milkovich* contrasted its holding in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), in which a newspaper published an article characterizing a real estate developer's negotiations with the city council as "blackmail."³⁷ In that case, the Court held that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole" rather than an assertion that the developer had actually committed the crime of blackmail.³⁸

²⁸ *Landers*, 2001 U.S. Dist. LEXIS 22023, at *16-17.

²⁹ *Aviation Charter, Inc. v. Aviation Research Group/US*, 416 F.3d 864, 871-72 (8th Cir. 2005).

³⁰ *See id.*

³¹ *Id.* at 870.

³² *Id.* at 869.

³³ *Id.*

³⁴ *Id.*

³⁵ *See id.* at 871.

³⁶ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3-4 (1990) (citing *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970)).

³⁷ *Id.* at 16.

³⁸ *Id.* at 16-17.

In contrast, the statement in *Milkovich* that the wrestling coach lied under oath was “not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury.”³⁹ The Court in *Milkovich* held that the “connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.”⁴⁰

In refusing to extend First Amendment protection to all opinions, the Court in *Milkovich* explained that even a subjective assessment could imply a false assertion of fact: “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.”⁴¹

The Eighth Circuit contrasted the reporter’s assertion in *Milkovich* with the safety rating in *Aviation Charter* to conclude that the safety rating was not “sufficiently factual to be susceptible of being proved true or false.”⁴² The court found that the interpretation of the data was “ultimately a subjective assessment,” “ARGUS chose which underlying data to prioritize, performed a subjective review of those data, and defined ‘safety’ relative to its own methodology.”⁴³

The Eighth Circuit also cited the Seventh Circuit’s holding in *Haynes v. Knopf, Inc.* in support of its holding in *Aviation Charter*.⁴⁴ In *Haynes*, a husband and wife sued an author concerning certain statements made about them in a book.⁴⁵ The language in *Haynes* that the Eighth Circuit quoted in *Aviation Charter* arises in the Seventh Circuit’s discussion of two statements in particular made by the wife to the author: (1) that the husband’s drinking was the cause of their son’s mental defects; and (2) that the husband’s motives for leaving his wife were financial.⁴⁶ The Seventh Circuit held that these two statements were not actionable because the plaintiffs were required to prove special damages, and even went on to speculate that the statements

³⁹ *Id.* at 21.

⁴⁰ *Id.*

⁴¹ *Id.* at 18-19.

⁴² *Aviation Charter, Inc. v. Aviation Research Group/US*, 416 F.3d 864, 871 (8th Cir. 2005) (quoting *Milkovich*, 497 U.S. at 21).

⁴³ *Id.* at 870-71.

⁴⁴ *Id.* at 871.

⁴⁵ 8 F.3d 1222, 1224 (7th Cir. 1993).

⁴⁶ *See id.* at 1226.

probably would not be actionable anyway because they were opinions.⁴⁷ The court noted that, while not all opinions are protected by the First Amendment, “if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.”⁴⁸ The court explained that a reasonable reader would not think the wife’s statement that her husband’s drinking caused her son’s mental defects was based on proof or scientific knowledge.⁴⁹

The Eighth Circuit erroneously found that the safety rating was incapable of being proved true or false because it misapplied the Supreme Court’s holding in *Milkovich*. Because the safety rating was not the type of communication at issue in *Milkovich*—that is, a question of whether the communication is hyperbolic in nature as opposed to an assertion of fact—the Eighth Circuit held that the general principle laid out by the Supreme Court in *Milkovich*—that something labeled “opinion” can still imply a ‘false assertion of fact—did not apply to the safety rating in *Aviation Charter*.⁵⁰ The comparison between the challenged communications in *Milkovich* and *Aviation Charter* is not apt because *Milkovich* dealt with whether the underlying assertion, that the coach had perjured himself, was capable of being proved false.⁵¹ In *Aviation Charter*, there is no question that the underlying facts are true—that is, that the databases on which ARGUS relied were accurate. Rather, *Aviation Charter* argued that ARGUS’s assessment of that information was erroneous, which the Supreme Court in *Milkovich* strongly indicated in dicta could be the basis for a false assertion of fact.⁵² The Eighth Circuit did not address whether ARGUS’s assessment of the data was erroneous.

The district court in *Landers* illustrated the distinction between types of communications by contrasting the employee’s performance rating in *Landers* with the statement that an em-

⁴⁷ *Id.* at 1226-27.

⁴⁸ *Id.* (citing *Milkovich*, 497 U.S. at 17-21). This was part of the language quoted by the Eighth Circuit in *Aviation Charter* in support of its holding. *Aviation Charter*, 416 F.3d at 871.

⁴⁹ *Haynes*, 8 F.3d at 1227.

⁵⁰ *Aviation Charter*, 416 F.3d at 871.

⁵¹ *See Milkovich*, 497 U.S. at 3-4.

⁵² Appellant’s Brief and Addendum, *supra* note 7, at 3. Recall the language in *Milkovich* stating that “[e]ven if the speaker states the facts upon which he bases his opinion . . . if his assessment of them is erroneous, the statement may still imply a false assertion of fact.” 497 U.S. at 18-19.

ployee was a troublemaker in *McGrath*.⁵³ The statement that the employee was a troublemaker was the type of hyperbolic language the Supreme Court found lacking in *Milkovich*.⁵⁴ The employee rating was a subjective assessment indicating specific facts about the employee's performance.⁵⁵

The holding in *Haynes* does not support the Eighth Circuit's position. The language the court points to in *Haynes* is dicta that generally states the holding in *Milkovich*.⁵⁶ The Eighth Circuit does not reconcile its holding in *Aviation Charter* with the Seventh Circuit's assertion in *Haynes* that the statement regarding the husband's drinking being the cause of his son's defects is conjecture because readers would not assume it was based on proof or scientific knowledge.⁵⁷ By inference, the safety rating would not be mere conjecture; readers would likely assume the rating was based on objectively verifiable data that have some bearing on safety.⁵⁸

A safety rating can be defamatory in nature if it is based on an erroneous assessment of objectively verifiable facts. If the assessment is erroneous because of flawed methodology, then it is capable of being proved true or false. ARGUS's assessment of the data was erroneous because its methodology was seriously flawed—a fact of which ARGUS was keenly aware since its own expert criticized it.⁵⁹

The connotation of ARGUS's rating was that Aviation Charter was unsafe. There are objectively verifiable data that could show this is not true. If Aviation Charter was allowed to present evidence of ARGUS's flawed methodology at trial, a jury could have concluded that ARGUS's ultimate assessment was erroneous. For instance, a jury could have concluded that using "incident" actions, which may have no bearing on safety, and using databases that are not predictors of safety to calculate a safety rating, generates a false rating. Further, ARGUS's failure to normalize the data, its failure to group the carriers in a statistically defensible way, and its failure to take into account the frequency

⁵³ *Landers v. Nat'l R.R. Passenger Corp.*, No. 00-2233, 2001 U.S. Dist. LEXIS 22023, at *16-17 (D. Minn. Dec. 28, 2001).

⁵⁴ See *Milkovich*, 497 U.S. at 21.

⁵⁵ *Landers*, 2001 U.S. Dist. LEXIS 22023, at *16-17.

⁵⁶ See *Aviation Charter*, 416 F.3d at 871 (citing *Haynes v. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)).

⁵⁷ See *Haynes*, 8 F.3d at 1227.

⁵⁸ See *id.*

⁵⁹ See Appellant's Brief and Addendum, *supra* note 7, at 7.

with which the less serious records occur, could all have led to the conclusion that the ultimate, subjective assessment was unreliable. A jury should have been allowed to make this determination.

Publishers of ratings and rankings provide a valuable public service. Consumers, incapable of researching and analyzing the data on all the goods and services they purchase, often rely on published rankings and ratings and believe them to be reliable assessments based on objectively verifiable data. Extending protection to the publication of any ranking or rating, no matter how erroneous the assessment or how malicious the intent with which it was published, leaves providers of goods or services defenseless against false assertions of fact that lower them in the estimation of their customers. Though the Eighth Circuit was correct that the First Amendment does not protect an opinion that implies a false assertion of fact, it erroneously concluded that the communication in this case was not sufficiently factual to avoid protection. In finding that ARGUS's safety rating was not defamatory because it was incapable of being proved true or false, the Eighth Circuit too narrowly construed the Supreme Court's holding in *Milkovich* and went a long way toward extending First Amendment protection to anything labeled "opinion," which the Supreme Court expressly refused to do in *Milkovich*.