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## Moldea v. New York Times Co., 22 F.3D 310 (D.C. Cir. 1994)

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## Moldea v. New York Times Co.,

22 F.3D 310 (D.C. CIR. 1994).

### INTRODUCTION

Dan E. Moldea (“Moldea”), an investigative journalist, sued the New York Times Company (“Times”) for defamation and false light invasion of privacy when it published a highly critical review of Moldea’s book in the *New York Times Book Review*. The United States District Court for the District of Columbia ruled that the Times’ review was not defamatory because it contained only unverifiable statements of the reviewer’s opinion of Moldea’s book, or of statements that no reasonable juror could find to be false. The United States Court of Appeals for the District of Columbia Circuit reversed, in *Moldea (I)*,<sup>1</sup> holding that the trial court erred in ruling that the Times’ review could not be defamatory as a matter of law, because some of the challenged characterizations of the book were sufficiently factual that a jury could determine their truth or falsity. Upon consideration of the Times’ petition for rehearing, the Court of Appeals conceded that it had applied an inappropriate standard in *Moldea (I)* and amended its earlier decision, subsequently holding that the challenged statements were supportable interpretations of Moldea’s book and that, as a matter of law, the review was substantially true. Based upon this new analysis, the Court of Appeals affirmed the District Court’s grant of summary judgment on behalf of the Times.

### FACTS

Plaintiff, Moldea, is an investigative journalist who specializes in stories about organized crime. His most recent book, *Interference: How Organized Crime Influences Professional Football*, published in 1989, was the subject of this suit. Defendant, Times, published a highly unfavorable review of *Interference* in the September 3, 1989 edition of the *New York Times Book Review*, written by Gerald Eskenazi, a sportswriter for the Times.

Moldea filed a defamation suit against the Times, alleging that the Times’ review destroyed public interest in his book and effectively ended his career as an investigative journalist. Moldea’s complaint alleged that six specific statements in the review were defamatory in that they accused Moldea of being an incompetent investigative journalist. The district court examined at length only one of the disputed statements: “But there is too much sloppy journalism to trust the bulk of this book’s 512 pages—including its whopping 64 pages of notes.”<sup>2</sup>

The district court found that challenged portions of the Times’ review consisted only of statements of non-verifiable opinion about a literary work, or were

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1. *Moldea v. New York Times Co.*, 15 F.3d 1137 (D.C. Cir. 1994).

2. *Moldea (I)*, 15 F.3d at 1141.

so clearly true that no reasonable juror could find them false. In granting the Times' motion for summary judgment, the trial court ruled that Moldea's claim was not actionable as a matter of law. The plaintiff appealed.

On appeal, the appellate court reversed, holding that some of the challenged characterizations of Moldea's book were sufficiently factual that a jury could determine their truth or falsity. The court therefore found summary judgment to be inappropriate and remanded the case for trial. The Times filed a motion for rehearing, which the court of appeals granted.

#### LEGAL ANALYSIS

The issue before the Court of Appeals on rehearing of the court's opinion in *Moldea (I)* was whether Moldea could in fact state a claim for defamation. A statement is defamatory under District of Columbia law "if it tends to injure plaintiff in his trade, profession, or community standing, or lower him in the estimation of the community."<sup>3</sup> The threshold inquiry in a defamation action is whether a statement is "capable of conveying a defamatory meaning."<sup>4</sup> If a statement is reasonably capable of a defamatory meaning, then the trier of fact must determine if it "was actually understood by the recipient in that sense."<sup>5</sup> In *Moldea (I)*, the appellate court found that Times' allegations that Moldea is a "sloppy" journalist and that his book contains incorrect or misleading portrayals of events satisfied this initial inquiry.

Although most courts formerly found assertions of "opinion" to be non-actionable, the United States Supreme Court recently adopted an analysis that recognizes statements of opinion can be actionable if they imply defamatory or provably false facts.<sup>6</sup> A speaker cannot shield himself from liability by simply prefacing otherwise defamatory statements with the words "In my opinion . . ." As a result, the appropriate inquiry is no longer merely whether a challenged statement is "fact" or "opinion," but instead whether a statement is sufficiently verifiable—i.e., whether a plaintiff can prove that a statement is false.

The court in *Moldea (I)* erred by relying upon a standard which ignored the fact that the statements at issue were solely evaluations of a literary work that appeared in the context of a book review. In its amended decision, the court stated that while there is no "per se" exemption from defamation for book reviews, the genre is one in which readers expect to find both favorable and unfavorable critiques of literary works, reflecting the reviewer's assessment of an author's work that is capable of a number of possible rational interpretations. The court found that the challenged statements were Eskenazi's assessments of Moldea's book, rather than assessments of Moldea himself. Although a critic's latitude is not unlimited, he or she must be given the "breathing space" appropri-

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3. *Moldea (I)*, 15 F.3d at 1142 (citing *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 654 (D.C. Cir. 1966)).

4. *Id.* at 1142 (citing RESTATEMENT (SECOND) OF TORTS § 614(1) (1977)).

5. *Id.* at 1142 (citing *White v. Fraternal Order of Police*, 909 F.2d 512, 519 (D.C. Cir. 1990)).

6. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

ate to the genre.<sup>7</sup>

The court in *Moldea (II)* next articulated a “supportable interpretation” standard for evaluating critical reviews, providing that a critic’s interpretation of a literary work must be rationally supportable by reference to the actual text of the written work. Such an analysis makes actionable only those reviews in which the critic is unable to support his or her interpretations by reference to the text evaluated. In situations where a reviewer, instead of evaluating the book, directly attacks a writer’s character, reputation, or competence, the critical statements remain potentially actionable.

In applying the “supportable interpretation” standard to the Times’ review, the court found it unnecessary to determine the verifiability of the assertion “too much sloppy journalism,” since statements contained in the review that support such a conclusion are supportable interpretations of Moldea’s book. The court ruled that as a matter of law, the proper analysis of the challenged statements’ verifiability was whether no reasonable person could find that the review’s characterizations were supportable interpretations of Moldea’s book. In applying this standard, the court held that the Times’ review was not defamatory.

Alternatively, the court considered whether the Times could escape potential liability based upon the defense of “substantial truth.” The court noted that most of the factual evidence upon which the Times relied in making its “sloppy journalism” assertion could not be proven false at trial. “Substantial truth” is generally regarded as a defense to defamation.<sup>8</sup> Although the District of Columbia Circuit has rejected the so-called “incremental harm rule,”<sup>9</sup> the court ruled that the “substantial truth” test still applied to the instant case. The court further found that because the reviewer justified his “sloppy journalism” assertion with true statements, supportable interpretations or supported opinions, the review was substantially true and therefore not actionable.

The court also addressed Moldea’s false light invasion of privacy claim. The court of appeals in *Moldea (I)* reversed the lower court’s ruling that Moldea could not state a claim for false light invasion of privacy because he failed to allege the publication of “private information.” The elements of false light invasion of privacy are met if the defendant published untrue facts concerning the plaintiff that placed him in a false light that would be highly offensive to a reasonable person.<sup>10</sup> Such a claim does not require the publication of private facts.<sup>11</sup> While false light claims are usually also actionable in defamation, a plaintiff is limited to recovery on only one of the two claims arising from a

7. *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

8. *See Liberty Lobby v. Dow Jones & Co.*, 838 F.2d 1287, 1296 (D.C. Cir. 1988), *cert. denied*, 486 U.S. 825 (1988).

9. *Moldea (I)*, 15 F.3d at 1149 (*citing Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984)), *vacated on other grounds*, 477 U.S. 242 (1986) (rejecting notion that a false defamatory statement cannot be actionable if made among other true statements because it does only “incremental harm” to a plaintiff’s reputation).

10. *Moldea (I)*, 15 F.3d at 1151 (*citing RESTATEMENT (SECOND) OF TORTS* § 652E (1977)).

11. *Id.* (*citing RESTATEMENT (SECOND) OF TORTS* § 652E, cmt. a).

single publication.<sup>12</sup> The appellate court noted that a plaintiff could not resort to a claim of false light invasion of privacy merely to avoid the burden of proof required to establish defamation.<sup>13</sup> The court in *Moldea (II)* found that because the Times was entitled to summary judgment on the defamation claim, Moldea's false light invasion of privacy claim must also be rejected.

#### CONCLUSION

In summary, statements of opinion can be defamatory if they imply a provably false fact. However, in the context of a book review, challenged statements are actionable in defamation only when the reviewer's interpretations are insupportable by reference to the text of the work being reviewed. Because the assertion of "sloppy journalism" contained in the Times' review was supportable by reference to specific passages in Moldea's book, the court rejected Moldea's libel and invasion of privacy claims. The court of appeals therefore modified its prior opinion, and affirmed the district court's grant of summary judgment in favor of the Times.

*Radoje A. Vujovic*

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12. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652E, cmt. b).

13. *Moldea (I)*, 15 F.3d at 1151 (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991)); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).