ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

***Rogers v. Young*, CV-21-0001-PR**

PARTIES:

Petitioner: Wendy Rogers ("**Rogers**") and Hal Kunnen

Respondent: Pamela Young ("**Young**") and Models Plus International, L.L.C.

FACTS:

In 2007, Steve Smith ("**Smith**") was hired as a talent agent by the Young Agency, a talent agency run by Pamela Young (the "**Agency**"). The Agency represented models and actors of all ages. As part of his work for the Agency, Smith maintained a "Modeling Agent" profile on the website ModelMayhem.com, a website that served as a marketplace for the modeling industry. The website had a reputation for facilitating disreputable practices and had been the subject of an ABC News report on allegations that it was being used by sexual predators.

In 2018, Smith and Rogers were opponents in the Republican primary for Arizona's First Congressional District seeking to unseat incumbent Democrat Tom O'Halleran. The primary campaign was "spirited, combative and sometimes unpleasant." *Rogers v. Hon. Mroz*, 250 Ariz. 319, 324 ¶ 9 (App. 2020). Rogers' campaign attacked Smith's character, accusing him of not being the pro-traditional family values candidate his campaign portrayed.

As part of her campaign, Rogers aired a radio attack ad that featured a "'narrator speaking in a grave and cautious tone' with 'creepy audio effects' in the background." *Id.* ¶ 10 (alteration omitted). The narrator stated:

> Tom O'Halleran is a dangerous leftist and ally of Nancy Pelosi and the open borders lobby, but he'll win again if we run Steve Smith for Congress. *Smith is a slimy character whose modeling agency specializes in underage girls and advertises on websites linked to sex trafficking* [(the "**challenged statement**")]. Smith opposed Trump, never endorsed Trump against Clinton and ridiculed our much needed border wall.
>
> Who'll beat O'Halleran? Wendy Rogers. Wendy Rogers strongly supports President Trump and the President's conservative agenda. Wendy Rogers is a decorated Air Force pilot, small business owner, and major supporter of President Trump's border wall. Slimy Steve Smith can't beat O'Halleran and the anti-Trump left. Only Wendy Rogers will.
>
> Wendy Rogers for Congress. Conservative, Republican, standing with President Trump, standing with us. I'm Wendy Rogers and I approve this message.

Id. (emphasis added). Rogers' campaign also maintained a website, www.slimysteve.com,

"which teemed with harsh criticism of Steve Smith," and included references to his work with the Agency. *Id.* ¶ 11. "Rogers ultimately prevailed in the primary election, defeating Smith by a narrow margin." *Id.* at 325 ¶ 13.

After the election, Young sued Rogers in state court for defamation and other claims, alleging that the attack ad and website "implied Young had committed or supported the commission of sex crimes" through her running of the Agency, which in turn employed Smith. Rogers moved for summary judgment, arguing that the First Amendment barred Young's claim for defamation. The trial court denied Rogers' motion in a brief order. Rogers then petitioned the court of appeals for special action relief.

In a split decision, the court of appeals granted special action review and reversed the trial court. The majority outlined the "significant constitutional protections" afforded for "speech on matters of public concern." *Id.* at 327 ¶ 26 (quoting *Milkovich v. Lorain J. Co.*, 491 U.S. 1, 16 (1990)). It then analyzed whether the challenged statement was defamatory by addressing whether the record contained enough evidence for reasonable persons to find by clear and convincing evidence that the statements were "capable of bearing a defamatory meaning under all the circumstances, from the standpoint of the average [listener] and accounting for the reasonable expectations of the audience." *Id.* ¶ 34 (alterations and internal quotation marks omitted) (quoting *Yetman v. English*, 168 Ariz. 71, 79 (1991) and *Knievel v. ESPN*, 393 F.3d 1068, 1073 (9th Cir. 2005)). The majority held that the challenged statement was not defamatory because it was "substantially true"— the Agency "had substantial experience and meaningful expertise in the field of child modeling" and Smith had a profile on Model Mayhem, a website that was the subject of an ABC New report on "sexual predators." *Id.* at 323 ¶ 5, 329 ¶ 38.

As for implied defamation, the court of appeals noted that Young contended that the challenged statement, even if substantially true, had been "configured to imply an actual, unstated defamatory statement of fact—that Young and the Agency aided or were complicit in sex trafficking." *Id.* at 329 ¶ 41 (alterations and internal quotation marks omitted). The court stated that defamation by implication "challenges the publication of facts which, taken together, reasonably imply undisclosed defamatory facts," and noted that such claims "necessarily rely on nuance and unstated inferences to reach a conclusion neither written nor spoken—juxtaposing facts to create a defamatory implication." *Id.* at 329–30 ¶ 41 (internal quotation marks omitted).

The majority stated that the record contained no evidence "showing that a reasonable factfinder could hear the statement that Young advertised on Model Mayhem as akin to an accusation of criminal conduct against Young." *Id.* at 330 ¶ 43 (citation omitted). The court noted that Young could have, but did not, introduce evidence such as "testimony and opinions of qualified lay and expert witnesses." *Id.* (citing *Yetman*, 168 Ariz. at 80).

In addressing the implied defamation claim, the majority also analyzed a three-part test set forth in Ninth Circuit decisions such as *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), to determine whether a statement could be taken "to imply an assertion of objective fact rather than opinion or argument" that is subject to First Amendment protection. *Id.* at 331 ¶ 46. The majority determined that the challenged statement was not impliedly defamatory under the three-part test because (1) the "general tenor of the entire work" negated the impression that the ad was asserting an objective fact because its "political purpose was overt and transparent" and it reflected "a hard punch thrown during a primary brawl;" (2) the ad "used figurative or hyperbolic language" such that "[r]easonable listeners could not confuse this unmistakable

flamethrower . . . as a statement of objective fact;" and (3) the statement was not "susceptible of being proved true or false" because the ad was "plainly aimed at Steve Smith; it never even mention[ed] Young or the Agency." *Id.* at 331 ¶¶ 46, 49, 332 ¶ 52, 333 ¶ 56.

Likewise, the majority held that Rogers' campaign blog could not be impliedly defamatory because the blog directed readers to the ABC News story that was the source of its information and because the blog was "directed with laser focus at candidate Steve Smith—not Young or her agency." *Id.* 335 ¶ 64. Consequently, the court of appeals majority reversed the superior court and entered summary judgment for Rogers.

The dissent would have held that the "statement in the radio ad was capable of bearing a defamatory meaning" and would have "left the resolution of the case to the jury" instead of deciding it on summary judgment. *Id.* 335 ¶ 72 (Cattani, J., dissenting).

Young then petitioned this Court for review and the Court agreed to address the issues listed below.

ISSUES:

1. *Yetman* [*v. English*, 168 Ariz. 71 (1991),] requires juries to resolve defamation cases when reasonable people might give conflicting interpretations to an assertion. The majority acknowledged two conflicting interpretations of Rogers's statement, but entered summary judgment in Rogers's favor. Did the appellate court err in precluding Young from presenting her case to the jury?

2. Did the appellate court err in disregarding *Yetman* and applying the Ninth Circuit's test under *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990) by effectively holding that:

    A. Statements made in campaign material cannot be understood as assertion of fact.

    B. Defamatory statements made in campaign material are protected if they are bookended by attacks on a political opponent.

    C. A statement is not actionable whenever a defendant can articulate a plausible non-defamatory meaning for the statement.

3. Did the appellate court err in holding *Yetman* requires defamation plaintiffs to present expert/lay witness testimony on summary judgment to prove a recipient would actually find the statement defamatory?