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## COURT ASKED TO LET BUSINESSES PROTECT THEIR GOOD NAME FROM FALSE REPORTS

*(Suzuki Motor Corp. v. Consumers Union of the United States)*

Last week the Washington Legal Foundation (WLF) filed a brief with the U.S. Court of Appeals for the Ninth Circuit, asking the court to let a business protect its good name from a false report published and then republished in the influential magazine *Consumer Reports*.

That false report was published in the July 1988 edition of *Consumer Reports*. The cover story warned American consumers that "the Samurai rolls over too easily." In particular, the magazine declared that the Samurai suffered from an "unusually high propensity to roll over while performing an accident avoidance maneuver that could be demanded suddenly of *any car during routine driving*." However, these statements were patently false and the magazine's publisher, Consumers Union (CU), knew it. CU knew that the Samurai had not rolled over, despite being driven 37 times through CU's standard course at speeds of up to 56.6 mph—more testing at higher speeds than any other vehicle tested at the time. Only after the Samurai passed such rigorous testing with flying colors did CU's Editorial Director scold CU's test drive by complaining, "If you can't find someone to roll this car, I will!" CU then redesigned its test course for the specific purpose of forcing the Samurai to lift off the ground.

Not content with its original misstatements, CU repeated them eight years later in the "60<sup>th</sup> Anniversary Issue" of *Consumer Reports*. In summarizing its institutional history, CU stated that in 1986 it "discover[ed] the Suzuki Samurai easily rolls over in turns and rate[d] it Not Acceptable." It later published virtually the same claim in a "Memo to Members, written by CU's President; in CD-ROMs offering advice to potential car buyers; and over the Internet. CU repeated these claims, despite its knowledge that the 1988 report had been based on rigged tests and that government agencies in the United States and Great Britain had criticized CU's conclusions for lacking a scientific basis.

Faced with millions of dollars in losses, Suzuki sued CU for product disparagement in the U.S. District Court for the Central District of California. By this Suzuki resolved to hold CU liable for making "an intentional disparagement of the quality of property, which

results in pecuniary damage." CU filed a motion for summary judgment, arguing that Suzuki had failed to show that CU acted with "actual malice," a term of art meaning that CU knew at the time that its statements were false, or acted with reckless disregard of their falsity. The court granted CU's motion, and Suzuki appealed.

In its brief filed with the Ninth Circuit, WLF raised three arguments. First, it pointed out that the district court's decision granting summary judgment, if adopted by other courts, would have the effect of preventing any business from presenting a product disparagement claim to a jury unless the business could produce evidence that the company admitted having acted with actual malice. WLF pointed out that this heightened standard is more stringent than the actual malice standard required under the law. Second, WLF argued that by erecting a more stringent standard than actual malice, the district court's decision threatens to wipe out the tort of product disparagement as a meaningful form of relief. Furthermore, WLF noted that denying relief for product disparagement would impose high costs on businesses and consumers alike. Third, WLF argued that such radical changes to tort law are not required by the First Amendment. Not only has the U.S. Supreme Court never said that product disparagement claims must be proved with actual malice, but the Court has made statements suggesting that the proper standard of proof in product disparagement cases is negligence. WLF urged the Ninth Circuit to reverse the district court's decision and allow Suzuki to present its claims to a jury.

"Product disparagement serves an important purpose in tort law," said Shawn Gunnarson, WLF's Senior Counsel for Litigation Affairs. "It allows companies that suffer from false and disparaging statements to recover compensation for their loss. Unless the district court's decision in this case is reversed, other courts may be tempted to make it impossible for companies to get relief from false reports—much to the detriment of American businesses and consumers alike."

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to defending and promoting the principles of free enterprise and individual rights.

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