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A Quarter Century Later: Revisiting Defamation in New Mexico

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A QUARTER CENTURY LATER: REVISITING DEFAMATION IN NEW MEXICO

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INTRODUCTION

According to a complaint filed in Bernalillo County, an Albuquerque attorney contacted a reporter for the *Albuquerque Journal* concerning University of New Mexico Head Football Coach Michael Locksley. During that communication, the lawyer allegedly told the reporter that Coach Locksley had fired her client, a former football administrative assistant, "because she was not a 'young gal' who could entice recruits."[1] The complaint further alleged that this and similar statements "were made with the sole purpose to force a settlement or early resolution to [the former administrator's] EEOC claim."[2]

The *Journal* published a front page article reporting the attorney's alleged remarks.[3] The very next day, Coach Locksley filed a suit for defamation against not the *Journal*, but rather against the lawyer and her client.[4] This lawsuit illustrates several reasons why defamation can be a fun area of the law to follow: it can involve both locally prominent people and issues that are literally off the front page of the newspaper. Moreover, if it had gone anywhere, the case would have presented some classic libel issues (Were the lawyer's alleged comments privileged from a defamation claim? To what extent would the lawyer be held responsible for the republication of her alleged remarks by the newspaper?) and some rather novel ones (Can a client be liable for conspiring with her lawyer to commit libel?). Alas, this case was evidently resolved by the parties fairly quickly,[5] so that these and other questions raised by this complaint went unanswered. Nonetheless, the case illustrates that defamation claims are alive and well in New Mexico and can present challenging issues.

In 1984, an author of this article published an article in the *New Mexico Law Review* that summarized the state of defamation law in New Mexico up to then, and posed questions to be addressed by New Mexico courts in the future.[6] Perhaps not surprisingly, all of those questions have not been answered in the quarter century since that article was published. In fact, developments in New Mexico defamation law have been rather limited. However, as this article notes in Part I, a new set of uniform jury instructions provides depth and coverage to the common law of

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1. Complaint for Defamation, Defamation Per Se, Intentional Infliction of Emotional Distress, Civil Conspiracy, Prima Facie Tort and Punitive Damages [hereinafter "Locksley Complaint"] ¶ 13(a), Locksley v. Warner, No. D-202-CV-200909659 (N.M. 2d Jud. Dist. Ct. Aug. 18, 2009).

2. *Id.* ¶ 14.

3. Greg Archuleta, *Lawyer: Locksley Wanted Pretty Office Girls*, ALBUQUERQUE J., Aug. 17, 2009, *available at* 2009 WLNR 16000778.

4. Locksley Complaint, *supra* note 1, at 1; SPORTING NEWS TODAY, *Locksley Files Defamation Suit Against Lawyer*, Aug. 19, 2009, http://www.sportingnews.com/college-football/article/2009-08-19/locksley-files-defamation-suit-against-lawyer (last visited May 1, 2010).

5. ESPN.com, EEOC Complaint Resolved for New Mexico Coach Mike Locksley, http://sports.espn.go.com/ncf/news/story?id=4554794 (last visited May 5, 2010).

6. Philip R. Higdon, *Defamation in New Mexico*, 14 N.M. L. REV. 321 (1984).

defamation claims. Nonetheless, New Mexico's appellate courts have struggled with uncertainties left to them by federal precedent, especially in issues involving privileges and defenses. Part II discusses actions taken by New Mexico's appellate courts to develop and refine defenses and privileges in defamation in the wake of new federal interpretations. Finally, Part III speculates on what developments to expect in New Mexico law in the next quarter century.

I. ELEMENTS OF A DEFAMATION ACTION

The common law elements of a defamation claim[7] have not changed since 1984. However, New Mexico cases today reference the New Mexico Statutes Annotated Civil Uniform Jury Instructions (UJI) 13-1001 to 13-10014 (and more specifically UJI 13-1002).[8] The UJI lists the elements a plaintiff must prove to succeed in a defamation action, as follows:

> (1) The defendant published the communication; and
> (2) The communication contains a statement of fact; and
> (3) The communication was concerning the plaintiff; and
> (4) The statement of fact was false; and
> (5) The communication was defamatory; and
> (6) The person[s] receiving the communication understood it to be defamatory; and
> (7) The defendant [knew the communication was false or negligently failed to recognize that it was false] [or] [acted with malice]; and
> (8) The communication caused actual injury to the plaintiff's reputation; and
> (9) The defendant abused or [its] privilege to publish the communication.[9]

The Uniform Jury Instructions, since their adoption, have been utilized by attorneys to formulate their cases and by the courts to determine whether a defamation claim exists.[10]

II. DEFENSES TO DEFAMATION ACTION

While the elements of a defamation claim have not materially changed since 1984, New Mexico's appellate courts and legislature have been at work in developing and refining defenses and privileges in defamation cases. Two particular as-

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7. "The elements of defamation include a defamatory communication published by the defendant, to a third person, of an asserted fact, of and concerning the plaintiff, and proximately causing actual injury to the plaintiff." Clough v. Adventist Health Sys., Inc., 108 N.M. 801, 806, 780 P.2d 627, 632 (1989); *see also* Trujillo v. City of Albuquerque, 211 F. App'x 670, 671–72 (10th Cir. 2006) (quoting *Clough*, 108 N.M. at 806, 780 P.2d at 632); Higdon, *supra* note 6, at 322.

8. *See Clough*, 108 N.M. at 806, 780 P.2d at 632; Newberry v. Allied Stores, Inc., 108 N.M. 424, 429, 773 P.2d 1231, 1236 (1989).

9. UJI 13-1002 NMRA 2008 (brackets indicating optional parts omitted).

10. Moore v. Sun Publ'g Corp., 118 N.M. 375, 379, 881 P.2d 735, 739 (Ct. App. 1994) ("As the parties note, our Supreme Court has adopted new Uniform Jury Instructions covering the law of libel and slander. The parties based their arguments on the new Uniform Jury Instructions, and in ruling on the motion for summary judgment the district court relied on those instructions.") (citation omitted); Cowan v. Powell, 115 N.M. 603, 604, 856 P.2d 251, 252 (Ct. App. 1993) (discussing UJI 13-1002 and 13-1010 to determine damages issue resulting from defamation action); Furgason v. Clausen, 109 N.M. 331, 339, 785 P.2d 242, 250 (Ct. App. 1989) (citing UJI 13-1003 and 13-1009 to provide framework for how to determine whether appellant has proven defamation claim).

pects of privilege have merited the most attention. The first addresses the sources of information on which a defamation defendant may rely to claim an absolute privilege from liability. The second concerns whether an alleged defamatory statement is one of opinion, and thus protected, or fact, and thus subject to liability.

A. Absolute and Qualified Privileges

While "[t]he traditional rule in New Mexico is that truth is an affirmative defense to an action for defamation,"[11] it is not the only way defendants can protect themselves from liability. In New Mexico, amongst other available defenses, claiming "[a]n absolute or unqualified privilege means absolute immunity from liability for defamation."[12] The absolute privilege applies to protect those "few situations in which there is an obvious policy in favor of complete freedom of expression regardless of the defendant's motives."[13] Absolute privilege specifically protects statements made in judicial proceedings[14] or simply those proceedings which are related to achieving the objects of litigation.[15] This privilege also protects comments made during quasi-judicial proceedings, such as administrative actions,[16] and also certain communications made within the executive branch of government.[17]

Because the Locksley action has been resolved, it is unknown what defenses the defendant's attorney may have pursued to avoid defamation liability. The alleged defamatory statements upon which Locksley based his claim against the attorney were apparently details of an age discrimination and sexual harassment complaint related to a lawsuit filed against Locksley by a former football administrative assistant.[18] Perhaps the most evident defense available for the defendant's attorney to assert would have been that her comments were absolutely privileged because, even though it appears her statements were made outside of a courtroom, they were made *in the course* of judicial proceedings.

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11. *Newberry*, 108 N.M. at 430, 773 P.2d at 1237; *see also* NMRA, Civ. UJI 13-1013 ("Truth is a defense to this action.").

12. Neece v. Kantu, 84 N.M. 700, 705, 507 P.2d 447, 452 (Ct. App. 1973).

13. Baker v. Bhajan, 117 N.M. 278, 281, 871 P.2d 374, 377 (1994).

14. *See* Superior Constr., Inc. v. Linnerooth, 103 N.M. 716, 719, 712 P.2d 1378, 1381 (1986) (observing that a notice of lis pendens was "merely a republication of the pleadings filed in the pending judicial proceeding and it should enjoy the same absolute privilege accorded those proceedings").

15. Romero v. Prince, 85 N.M. 474, 477, 513 P.2d 717, 720 (Ct. App. 1973) ("It is not absolutely essential, in order to obtain the benefits of absolute privilege, that the language claimed to be defamatory be spoken in open court or contained in a pleading, brief, or affidavit. If the alleged defamatory statement is made to achieve the objects of the litigation, the absolute privilege applies even though the statement is made outside the courtroom and no function of the court or its officers is invoked.") (citation and quotations omitted); Penny v. Sherman, 101 N.M. 517, 520, 684 P.2d 1182, 1185 (Ct. App. 1984) (noting that statements made in relation to "an ongoing or contemplated judicial proceeding" could receive absolute privilege protection); *but see* Gregory Rockhouse Ranch, L.L.C. v. Glenn's Water Well Serv., Inc., 2008-NMCA-101, ¶ 19, 191 P.3d 548, 554 (denying absolute privilege defense as to particular communications because they were made at a time well before litigation was seriously contemplated).

16. Hollars v. S. Pac. Transp. Co., 110 N.M. 103, 108, 792 P.2d 1146, 1151 (Ct. App. 1989) ("The parties agree that any statements made during the formal hearings conducted by the Company and the Special Adjustment Board were absolutely privileged.").

17. *Baker*, 117 N.M. at 281, 871 P.2d at 377.

18. *See Locksley Files Defamation Suit Against Lawyer*, *supra* note 4.

While "'[t]he application of an absolute privilege is confined to very few situations,' qualified privileges apply to a broader array of circumstances."[19] The qualified privilege serves to protect those communications which consist "of a good faith publication in the discharge of a public or private duty."[20]

In *Gregory Rockhouse Ranch*, the defendant sought application of the qualified privilege to protect comments made to two government entities involving a slander of title action.[21] There, the comments were not absolutely privileged even though they involved an administrative agency because the court found that the permit application process was not a quasi-judicial proceeding.[22] The court adopted the reasoning found in the Restatement[23] to determine whether to invoke a qualified privilege. The Restatement recommends a two-step process. First, the analysis considers the publisher's viewpoint by stating that protection applies if the publisher had a sufficiently important interest at stake and the receiver of the statement would need the information to protect that interest.[24] Second, section 598 of the Restatement provides a standard from the recipient's perspective, stating that the communication is conditionally privileged if the communication contains information affecting an important public interest, and that interest requires communication of the information to an individual authorized to take action if the information is true.[25] Under both sections, the analysis of the qualified privilege requires "evaluation of the audience and the apparent utility of the communications."[26] Thus, in *Gregory Rockhouse Ranch*, this prong was satisfied as the recipients of the alleged defamatory statements, the Federal Bureau of Land Management and New Mexico Office of the State Engineer, were entities in a position to affect the interest at issue.[27]

The process for determining the application of the qualified privilege, however, does not end after this "Restatement" inquiry. After the elements required by the "publisher-recipient" analysis are deemed satisfied, there must be a finding that the privilege was not abused.[28] Abuse of privilege can occur if the publisher lacks belief that the communication was true, if the publication of the information is for an improper use, or if the publisher provides the statement to a recipient who is not in a position to accomplish the purpose behind the statement.[29] Thus, in *Greg-*

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19. *Gregory Rockhouse Ranch*, 2008-NMCA-101, ¶ 25, 191 P.3d at 555 (alteration in original) (quoting *Baker*, 117 N.M. at 281, 871 P.2d at 377); *see also* Hagebak v. Stone, 2003-NMCA-007, ¶ 17, 61 P.3d 201, 206 ("Traditionally, New Mexico courts have been very circumspect in recognizing absolute privilege.").

20. *See* UJI 13-1012 NMRA; *Hagebak*, 2003-NMCA-007, ¶ 13, 61 P.3d at 205.

21. *Gregory Rockhouse Ranch*, 2008-NMCA-101, ¶¶ 17–19, 191 P.3d at 554.

22. *Id.* ¶ 22, 191 P.3d at 555 ("Although we may reasonably assume that the permit applications precipitated some sort of administrative activity, we find no indication in the record that quasi-judicial proceedings took place" and "therefore decline . . . to extend an absolute privilege to the communications at issue in this case. . . .").

23. RESTATEMENT (SECOND) OF TORTS §§ 594, 598 (1977).

24. *Gregory Rockhouse Ranch*, 2008-NMCA-101, ¶ 26, 191 P.3d at 555 (citing RESTATEMENT (SECOND) OF TORTS § 594 (1977)).

25. *Id.* ¶ 27, 144 N.M. at 697–98, 191 P.3d at 555–56 (citing RESTATEMENT (SECOND) OF TORTS § 598 (1977)).

26. *Id.* ¶ 31, 191 P.3d at 556.

27. *Id.* ¶¶ 31–32, 191 P.3d at 556 (noting that the Federal Bureau of Land Management controlled the federal land at issue in the case while the New Mexico Office of the State Engineer administered all the water rights throughout New Mexico).

28. *Id.* ¶ 33, 191 P.3d at 557 (citing Baker v. Bhajan, 117 N.M. 278, 283, 871 P.2d 374, 379 (1994)).

29. *Id.* ¶ 33, 191 P.3d at 557.

ory Rockhouse Ranch, to claim qualified privilege protection, the defendant had to prove not only that the communications affected public or private interests, but also that the privilege was not abused and the parties who received the communications were appropriate audiences.[30] Ultimately, the court granted qualified privilege protection because the comments were made out of the public's interest, made to an appropriate agency to affect a change regarding protection of that interest, and the privilege was not abused.[31]

The corporate and employer-employee contexts provide a greater amount of substantive development concerning qualified privilege during the last twenty-five years. In 1984, through the qualified privilege, a former employer was immune from damages in a slander suit when the alleged defamatory statements arose out of an inquiry addressed to the former employer concerning an employee's job capabilities.[32] This protection continues today,[33] and New Mexico has enacted a statute furthering efforts to promote employer disclosure while simultaneously protecting employers from defamation actions. Under that statute,

> When requested to provide a reference on a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee's job performance. The immunity shall not apply when the reference information supplied was knowingly false or deliberately misleading, was rendered with malicious purpose or violated any civil rights of the former employee.[34]

Davis v. The Board of County Commissioners addressed an issue that is the reverse of a defamation action: Do former employers owe a duty to prospective employers to reveal unfavorable information about an applicant? In *Davis*, supervisors at a detention center had provided favorable reviews for a former employee with a history of sexual harassment complaints.[35] After being hired at another hospital (whose decision to hire the former employee was based in part on the supervisors' favorable reviews), the employee was accused of engaging in sexual assault and other acts of sexual harassment.[36] In a negligent hiring case brought against the second hospital, the court ruled that it would impose a common-law duty upon employers to disclose certain information.[37] The court adopted the commentary found in section 311 of the Restatement[38] concerning negligent misrepresentation of information involving the risk of physical harm and how it applied "to an em-

30. *Id.* ¶¶ 33–35, 191 P.3d at 557.

31. *Id.* ¶¶ 30–32, 35, 191 P.3d at 556–57.

32. *See* Gengler v. Phelps, 92 N.M. 465, 468, 589 P.2d 1056, 1059 (Ct. App. 1978) (holding that doctor's comments concerning a former employee nurse-anesthesiologist were protected by the qualified privilege because "even though the oral publication may be of some harm to an anesthetist," hospitals are "vitally interested in the qualifications of anesthetists whose conduct may affect the life or health of its patients").

33. *See* Davis v. Bd. of County Comm'rs, 1999-NMCA-110, ¶ 29, 987 P.2d 1172, 1181 ("New Mexico's common law reflects . . . a policy of encouraging employer disclosure by recognizing a 'qualified or conditional privilege [against a defamation claim] to make statements about its employee or former employee if for a proper purpose and to one having a legitimate interest in the statements.'" (alteration in original) (quoting *Baker*, 117 N.M. at 282, 871 P.2d at 378)).

34. NMSA 1978, § 50-12-1 (1995).

35. *Davis*, 1999-NMCA-110, ¶¶ 8–9, 987 P.2d at 1176.

36. *Id.* ¶¶ 2–4, 987 P.2d at 1175.

37. *Id.* ¶ 31, 987 P.2d at 1182.

38. RESTATEMENT (SECOND) OF TORTS § 311 (1965).

ployer's duty of care in making employment references and the circumstances under which that duty extends to foreseeable third parties."[39] The *Davis* court found that these principles were "harmonious with the general propositions of New Mexico law that govern duty of care and duty to third parties."[40] However, at the same time, the court desired to offer protection to those former employers by stating that, "[w]hen physical harm by the employee is foreseeable, the employer who discloses will be protected against defamation by the qualified privilege."[41] The court recognized that this duty could silence employers from providing referrals, as overly cautious employers could be "deterred unnecessarily from volunteering helpful information and elect to remain silent" rather than provide a reference and fear future litigation.[42] The court noted that "[i]n the face of silence from a former employer, the prospective employer [could] still conduct its own investigation" and thus silence was better than misleading information because if a former employer were to provide misleading information, the prospective employer may "relax its own guard" and not thoroughly investigate the candidate.[43] Despite acknowledging that overly cautious employers could forego providing a reference at all in light of this duty, the court provided that "the policy gains of imposing a duty not to misrepresent under these limited circumstances" upon those who did offer references would outweigh any potential negative consequences of inhibiting employer disclosure.[44]

While the freshly minted statutory protection may have limited lawsuits concerning employer-employee reference disputes, other new issues have arisen concerning the qualified privilege in the workplace. In 2002, a New Mexico court analyzed whether to adopt the intracorporate communication exception recognized in other jurisdictions.[45] The intracorporate communication exception held that "communications among the employees, officers, or agents of a corporation [were] not 'published,' because they do not extend beyond the corporation."[46]

In the New Mexico case, *Hagebak v. Stone*, a psychologist who was terminated from his position at the Los Alamos Family Council, was denied reinstatement to his post after another employee of the Council, Stone, provided testimony largely critical against Hagebak at a grievance hearing.[47] Hagebak brought a defamation action against Stone for her critical comments. The district court granted summary judgment against Hagebak's defamation claim, finding that Stone's statements were not published because they were intracorporate communications made by

39. *Davis*, 1999-NMCA-110, ¶ 20, 987 P.2d at 1179.
40. *Id.*
41. *Id.* ¶ 31, 987 P.2d at 1182.
42. *Id.*
43. *Id.*
44. *Id.*
45. Hagebak v. Stone, 2003-NMCA-007, 61 P.3d 201 (2002).
46. *Id.* ¶ 6, 61 P.3d at 204 (citing Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1553 (10th Cir. 1995) (applying Oklahoma law); *see also* Lovelace v. Long John Silver's, Inc., 841 S.W.2d 682, 684 (Mo. Ct. App. 1992) ("[C]ommunications between officers of the same corporation in the due and regular course of the corporate business, or between different offices of the same corporation, are not publications to third persons.") (internal quotation marks omitted); M & R Inv. Co. v. Mandarino, 103 Nev. 711, 716, 748 P.2d 488, 491 (1987) (finding that no claim for defamation could exist because "[t]he communication of the allegedly defamatory statement between Mennie and Cooper, both employees of M & R, is not publication").
47. *Hagebak*, 2003-NMCA-007, ¶ 2, 61 P.3d at 203.

Stone to other employees and agents of the corporation within the scope of her duties at the council.[48] The appellate court recognized that "New Mexico courts [had] not previously discussed whether to recognize this exception under New Mexico law" and examined the intracorporate exception by balancing the pros and cons of introducing the concept into New Mexico law.[49] While, on the one hand, the intracorporate communication exception would support public policy by allowing corporations to "communicate internally in a free and candid manner,"[50] protecting all intra-corporate communication could be overbroad, as "[f]alse statements knowingly made, even malicious lies disseminated with devastating effect . . . would be] protected on an equal plane with statements innocently made in the best interest of the corporation."[51]

After extensive deliberation,[52] the court ultimately declined "to adopt the intracorporate communication exception as an absolute bar to a lawsuit for defamation."[53] Instead, the court favored the "qualified-privilege approach that affords substantial protection to the corporation, while at the same time preserving defamation remedies for the worst kind of abuse that causes unprivileged injury to reputation."[54]

From a theoretical standpoint, this decision seems to balance the needs of corporate entities with those of private citizens. However, as a practical matter, the decision creates issues of fact that will have to be dealt with on a case-by-case basis. Was the statement false? Was it knowingly made? Was it maliciously made? Was it injurious? *Hagebak* tells us there will be no absolute protection in these cases and that these sub-issues will have to be addressed in each case.

B. Fact Versus Opinion

One of the other defenses receiving attention in New Mexico in recent years concerns the distinction between statements of fact and opinion. As a general matter, a defamation action "lies only for statements of fact and not for statements of opinion."[55] At one time, the line between "statements of fact" and "statements of opinion" seemed pretty clear. However, in 1990, the U.S. Supreme Court managed to blur the distinction between the two, leaving courts in New Mexico (and other courts across the country) with the task of applying a less than clear standard.

In 1974, in *Gertz v. Robert Welch, Inc.*, the U.S. Supreme Court reaffirmed the key distinction in the treatment between opinion and fact:

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48. *See id.* ¶ 7, 61 P.3d at 204.
49. *Id.* ¶ 6, 61 P.3d at 204.
50. *Id.* ¶ 10, 61 P.3d at 205.
51. *Id.* ¶ 15, 61 P.3d at 206.
52. *See id.* ¶¶ 5–22, 61 P.3d at 203–08; *id.* ¶ 20, 61 P.3d at 207 ("Although the lack of an absolute intracorporate communication exception may expose corporations to defamation liability, thereby affecting insurance rates and operating costs, that cost may properly be considered part of the price of accountability in a free and responsible society.").
53. *Id.* ¶ 22, 61 P.3d at 208.
54. *Id.*
55. Saenz v. Morris, 106 N.M. 530, 533, 746 P.2d 159, 162 (Ct. App. 1987); *see also* Moore v. Sun Publ'g Corp., 118 N.M. 375, 381, 881 P.2d 735, 741 (Ct. App. 1994) ("The legal decision that a particular statement is 'opinion' makes the statement absolutely nonactionable, even though it might well remain defamatory. . . .") (internal quotation marks omitted).

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.[56]

Following *Gertz*, the Court had opportunities to clarify the protection given to statements of opinion. Rather than seize the opportunity, the Court muddied the waters by its decision in *Milkovich v. Lorain Journal Co.*[57] There, a high school wrestling coach pursued a defamation action after the local newspaper published an article concerning the coach's testimony in court. The coach alleged that the article accused him of committing perjury, "an indictable offense in the State of Ohio," and thus "damaged [him] directly in his lifetime occupation of coach and teacher, and constituted libel per se."[58] Specifically, the coach complained of comments in the article such as: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."; "If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened."; and "[The lesson] is simply this: If you get in a jam, lie your way out."[59] The Ohio Court of Appeals affirmed summary judgment against the coach, in part, finding the article to contain opinion, rather than statements of fact.[60]

The U.S. Supreme Court rejected the notion that "an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment."[61] The Court reasoned that the *Gertz* dictum, quoted above,[62] was not meant to be a "wholesale defamation exemption for anything that might be labeled 'opinion.'"[63] Thus, the Court's key inquiry was to determine whether "a reasonable fact-finder could conclude that the statements in the . . . column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding."[64]

The Court ruled that the comments at issue were not statements of opinion, but instead could be read as statements of fact by the average reader.[65] The Court held that the language the author utilized was "not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that [the coach] committed the crime of perjury."[66] Further, because

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56. 418 U.S. 323, 339–40 (1974) (footnote omitted).
57. 497 U.S. 1 (1990).
58. *Id.* at 6–7 (internal quotation marks omitted).
59. *Id.* at 4–5 (internal quotation marks omitted).
60. *Id.* at 3.
61. *Id.* at 21.
62. *Supra*, note 56 and accompanying text.
63. *Id.* at 18.
64. *Id.* at 21.
65. *See id.* ("We . . . think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.").
66. *Id.*

the author's comments could be verified by comparing the transcripts of the OH-SAA hearing and the trial court testimony, the Court held that "[u]nlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event."[67] Thus, while the Court had the opportunity to provide full protection to statements of opinion and tip the balance of doubt in favor of free expression, it declined to do so and instead left a vague standard open to the interpretations of various courts across the country.

New Mexico courts have been "guided" in this area by UJI section 13-1004. That section, entitled "Statement of fact: Fact defined; opinion contrasted," provides:

> To support a claim for defamation, the communication by defendant must contain a statement of fact.
>
> In contrast, statements of opinion alone cannot give rise to a finding of defamation.
>
> [However, an opinion which implies that it is based upon the existence of undisclosed facts is the same as a statement of fact.]
>
> In deciding whether the communication is or contains a statement of fact, you should consider the following:
>
> (A) The entirety of the communication and the context in which the communication was made; and
>
> (B) Whether reasonable persons would be likely to understand the communication to be a statement of the defendant's opinion or a statement of fact.[68]

Section 13-1004 of the UJI does its best to follow the murky dictates of the *Milkovich* decision, but simply reading it suggests how lost jurors are likely to be in their attempts to apply the law given them. In analyzing these factors, New Mexico's courts have focused on the location of a communication to determine whether the statement was fact or opinion. For example, courts have specifically acknowledged that placement within an editorial section will help support the finding that the defamatory statements are opinions.[69] Moreover, New Mexico recognizes "verifiability as the controlling element in determining whether a statement is fact or opinion."[70] Thus, opinions are those "statements which cannot be proved or disproved."[71]

Even with these attempts to clarify the standard, New Mexico courts recognize that "'[n]o task undertaken under the law of defamation is any more elusive than

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67. *Id.* at 22 (internal quotation marks omitted).

68. *See* UJI § 13-1004 NMRA (brackets in original).

69. *See* Mendoza v. Gallup Indep. Co., 107 N.M. 721, 723, 764 P.2d 492, 494 (Ct. App. 1988) ("In considering the 'entirety' requirement, the published statement must be read in context. First, the column here was situated on the 'Opinion' page of the newspaper along with four other articles and an editorial cartoon. Readers of the opinion-editorial page generally expect to read the columnist's views and opinions as opposed to factual news stories."); Andrews v. Stallings, 119 N.M. 478, 485, 892 P.2d 611, 618 (Ct. App. 1995) ("[T]he statement was advanced in an editorial context, which indicated that it was a forum for the expression of opinion, not the recitation of fact.").

70. Moore v. Sun Publ'g Corp., 118 N.M. 375, 382, 881 P.2d 735, 742 (Ct. App. 1994) (internal quotation marks omitted).

71. *Id.*

distinguishing between [fact and opinion].'"[72] Moving forward, the best advice to practitioners in this area may be merely to reassert the obvious. That is, when analyzing the sustainability of the opinion defense, or trying to overcome it, carefully examine the placement of a communication, its tone and temperament, and then make an educated guess as to what the average reader may conclude.

III. GOING FORWARD

The developments in defamation law in New Mexico have contained few surprises, and some results, such as the virtual elimination of the substantive distinctions between libel and slander, were easily predicted.[73]

The upheaval in defamation law created by the torrent of U.S. Supreme Court decisions in the sixties, seventies, and eighties has quieted. As a result, New Mexico and, presumably, many other states have had less occasion to review their own rulings, especially in the constitutional arena, in light of the relatively few developments at the federal level. It may be that the mere passage of time, along with changes in personnel on the U.S. Supreme Court, will result in a review of defamation law principles that have been relatively static for a while. Until that occurs, it is likely that changes to the law of defamation at the state as well as federal level will be an evolutionary process, not revolutionary.

72. *Id.* (second alteration in original) (quoting ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS § IV.2, at 155 (1st ed. 1980)).

73. *See* Higdon, *supra* note 6, at 321; Newberry v. Allied Stores, Inc., 108 N.M. 424, 429, 773 P.2d 1231, 1236 (1989) ("The lines of demarcation between slander (an oral communication) and libel (a written communication), subcategories of defamation, have become sufficiently blurred that we agree there are good reasons for abolishing the distinction between [them].") (internal quotation marks omitted).