MENDOZA V. GALLUP INDEP. CO., 1988-NMCA-073, 107 N.M. 721, 764 P.2d 492 (Ct. App. 1988)

HARRY MENDOZA, Plaintiff-Appellee,
vs.
THE GALLUP INDEPENDENT CO., JOHN K. ZOLLINGER, ROBERT C. ZOLLINGER, DONALD W. GREEN a/k/a "VERITAS", and REED ECKHARDT, Defendants-Appellants

No. 10501

COURT OF APPEALS OF NEW MEXICO

1988-NMCA-073, 107 N.M. 721, 764 P.2d 492

August 16, 1988, Filed

APPEAL FROM THE DISTRICT OF McKINLEY COUNTY, LOUIS E. DePAULI, Judge

Certiorari not Applied for

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OPINION

*{*722}* GARCIA, Judge.

{1} Defendants appeal the trial court's denial of their motion for summary judgment in a defamation action. We granted defendants' application for interlocutory appeal, which raised the following two issues: (1) whether the statement at issue constitutes opinion, as a matter of law and, accordingly, whether the trial court erred in denying defendants' summary judgment motion; and (2) whether defendants made a prima facie showing that the statement, regardless of its nature, was made absent actual malice. We deem

issue one to be dispositive and, accordingly, will not address the remaining issue. We reverse.

{2} This action arose out of the publication of a column entitled "The Week's Wash" appearing in the opinion-editorial section of "The Gallup Independent" on April 18, 1987. **See** attached Appendix A. Plaintiff, Harry Mendoza (Mendoza), a Gallup city councilman, sued defendants for libel. The column describes a Gallup "tourism promotion" office outside of City Hall. Several tourists approach the "tourism counselor" for information. The counselor's office is made of packing crates, much like the famed character Lucy's psychiatrist office in Charles Shultz' "Peanuts" cartoon. The defamatory statements arise from the following exchange between the "tourism counselor" and "two tall, swarthy suit-and-tie types":

"I'm agent Frammis and this is agent Stanfran," one said, flashing open a dark wallet with gold leaf and fine black printing inside. "We're here to investigate your City Council."

"R-r-right in there," WW [Week's Wash] stammered. "But it's not in session just now. C-can I direct you to any particular member?"

"We have received a report," said the other one, "that the council has been taken over by the Mexican Mafia. What can you tell us about that?"

This was scarey. Word sure travels fast.

"Well, um, er, the new council hasn't met yet. But the new mayor is known for shooting first and asking questions later."

They patted the bulges under their coats.

"B-but he doesn't take office until May 5," WW hurried on. "He's already taken one straw vote on replacing the city manager, however."

"That may be it," said agent Stanfran. "Did anything happen that might support our tip?"

"Well, it's only one instance, and it's pretty controversial," WW equivocated, "and I can't say if it's the start of a trend. But you can decide for yourself.["]

"The vote was Munoz, Mendoza, and Gutierrez on one side and Richards and Hight on the other."

{3} Mendoza alleges that the above statements imputed his involvement in corruption, dishonesty and criminal activity. The thrust of Mendoza's complaint is that the writing falsely links him to the Mexican Mafia. He does not contend, however, that the writing accuses him of any specific *{*723}* criminal act or wrongdoing. Defendants moved for summary judgment on two grounds: (1) that the column was opinion and absolutely

privileged as a matter of constitutional law; and (2) that defendants did not knowingly or recklessly publish a false statement of fact and, thus, did not act with actual malice as required by **New York Times Co. v. Sullivan,** 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Mendoza responded with affidavits of various persons who interpreted the column as conveying factual allegations concerning him, together with his own affidavit on the issue of actual malice. The trial court, carefully and correctly noting factual disputes in the affidavits, denied defendants' summary judgment motion and certified its order for interlocutory appeal.

Whether the published statement constitutes opinion or fact.

{4} We initially note that if the statements are purportedly "facts" as opposed to "opinions", then the trial court properly denied summary judgment because there are factual disputes on material issues which are properly resolved by a fact finder. The same is not true, however, if the statements constitute opinion. An action for defamation lies only for false statements of fact and not for statements of opinion. **Saenz v. Norris,** 106 N.M. 530, 746 P.2d 159 (Ct. App.1987). We recognize that:

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.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40, 94 S. Ct. 2997, 3006-07, 41 L. Ed. 2d 789 (1974) (footnote omitted).

{5} When the alleged defamatory statements could be fact **or** opinion, it is proper to deny summary judgment, as the trial court did here, and allow the fact finder to resolve the dispute. **See Marchiondo v. New Mexico State Tribune Co.,** 98 N.M. 282, 648 P.2d 321 (Ct. App.1981). However, if the statements are unambiguously opinion, the trial court may properly rule as a matter of law. **Marchiondo v. Brown,** 98 N.M. 394, 649 P.2d 462 (1982). Thus, we must initially determine whether the alleged defamatory material contains a protected statement of opinion.

{6} In commenting on the differences between statements of fact and opinion, the California supreme court noted:

The distinction frequently is a difficult one, and what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.

Gregory v. McDonnell Douglas Corp., 131 Cal. Rptr. 641, 644, 552 P.2d 425, 428 (1976).

{7} In resolving the distinction between fact and opinion, the trial court should consider: (1) the entirety of the publication; (2) the extent that the truth or falsity of the statement may be determined without resort to speculation; and (3) whether reasonably prudent persons reading the publication would consider the statement to be an expression of opinion or a statement of fact. **Marchiondo v. Brown; see** SCRA 1986, 13-1004. In applying the above test to the statements, we believe the column expresses statements of opinion rather than fact.

{8} 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. **Aldoupolis v. Globe Newspaper Co.,** *{*724}* 398 Mass. 731, 500 N.E.2d 794 (1986) (En banc); **see Ollman v. Evans,** 750 F.2d 970 (D.C. Cir.1984), **cert. denied,** 471 U.S. 1127, 105 S. Ct. 2662, 86 L. Ed. 2d 278 (1985); **Loeb v. Globe Newspaper Co.,** 489 F. Supp. 481 (D. Mass.1980); **National Rifle Ass'n v. Dayton Newspapers, Inc.,** 555 F. Supp. 1299 (S.D. Ohio 1983).

{9} Second, the column indicates, by the tag line "DAYS OF OUR LIVES", that it is fictitious in nature and not intended to represent factual statements. In addition, the column is entitled "The Week's Wash" and depicts a drawing of a clothes line laden with clothing. The column's setting is unreal. The tourism office is set up "on the front walk of City Hall in a booth made out of a couple of apple crates, Lucy-style." The homemade sign reads: "'Free Tourism Information -- The tourism counselor is IN.'" Equally fictitious are the visitors to the booth: one visitor has heard that "'Red Rock Park has cracks in it the size of the Grand Canyon * * * *'"; another has heard that Gallup has the "'world's biggest zero.'"[1] The tongue-in-cheek style used by the author alerts all but the most careless readers that the descriptions were no more than rhetorical hyperbole. **See Pring v. Penthouse Int'l, Ltd.,** 695 F.2d 438 (10th Cir.1982), **cert. denied,** 462 U.S. 1132, 103 S. Ct. 3112, 77 L. Ed. 2d 1367 (1983); **Catalfo v. Jensen,** 657 F. Supp. 463 (D.N.H.1987); **Ollman v. Evans.**

{10} Moreover, under the second-prong of the **Marchiondo** test, the column constitutes "pure opinion". See 3 Restatement (Second) of Torts § 566 (1977); **Saenz v. Morris.** Under the Restatement, "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Restatement, supra, § 566 at 170. However, if the material, as a whole, fully discloses the facts upon which the opinion is based and permits the reader to reach his own opinion, the statement is generally an opinion rather than an assertion of fact, and is absolutely protected. **Saenz v. Morris; Kutz v. Independent Publishing Co.,** 97 N.M. 243, 638 P.2d 1088 (Ct. App.1981).

{11} In the case at bar, "WW" is asked whether the Mexican Mafia has taken over the council. "WW" reaches no conclusion, but reports the vote results on the straw poll, together with the surnames of the councillors who cast the votes. The writer invites readers to reach their own conclusions by stating to "agents" Stanfran and Frammis, "'[I]t's only one instance * * * and I can't say if it's the start of a trend. But you can decide for yourself.'"

{12} Plaintiff argues that the writer's observation that: "This was scarey. Word sure travels fast." implies that the author had private knowledge that the council had been taken over by the "Mexican Mafia." We disagree. When placed in context and read as a whole, we believe the column discloses the factual basis for the writer's opinion, namely, the straw vote to replace the city manager, and the ethnicity of the councillors who cast the votes. The opinion leaves no room for speculation or implication that the writer has private knowledge of defamatory facts. **See Marchiondo v. Brown.**

{13} For the third-prong of the **Marchiondo** test, plaintiff submitted affidavits of various members of the Gallup and Raton community to show that six reasonably prudent persons interpreted the column's statements as a representation of fact. Each affiant expressed their belief that the term "Mexican Mafia" referred to a vast criminal organization whose leaders are of Mexican descent. Each also interpreted the column as a statement that Mendoza was either a member of, or under the control of, the "Mexican Mafia." These affidavits, though well-intended, are irrelevant. Whether the statements are capable of a defamatory meaning is initially a question *{*725}* of law for the trial court, not a question of fact. **See Marchiondo v. New Mexico State Tribune Co.**

{14} In addition to failing the **Marchiondo** three-prong test, plaintiff's reliance on **Cianci v. New Times Publishing Co.,** 639 F.2d 54 (2nd Cir.1980), is misplaced. In **Cianci,** plaintiff was accused, in a published magazine article, of specific criminal acts, including rape, and of paying off the victim to avoid prosecution. The **Cianci** court held that the charges were not employed in a "'loose, figurative sense'" or as "'rhetorical hyperbole,'" as here, rather, the court determined that the statement imputed specific criminal activity. **Id.** 639 F.2d at 64. Such is not the situation here. No specific accusation was made against Mendoza; no specific criminal act was charged. Further, the underlying facts giving rise to the publisher's opinion are apparently undisputed: a straw vote was taken; the vote was three-to-two; three councillors with Hispanic surnames voted one way, while the two remaining councillors voted another. This was not the case in Cianci, where the underlying facts were vigorously challenged.

{15} Nor is plaintiff's reliance on **Hustler Magazine v. Falwell,** U.S...., 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) well founded. In **Hustler Magazine,** plaintiff Falwell sued defendant Hustler Magazine for invasion of privacy, libel, and intentional infliction of emotional distress. **Id.** The suit arose out of Hustler's publication of an advertisement parody concerning Falwell. **Id.** The trial court directed a verdict for defendant on the privacy claim and the jury found for defendant on the libel claim. **Id.** The jury, however, awarded damages to plaintiff on his claim for intentional infliction of emotional distress.

Id. On appeal, the Supreme Court reversed Falwell's money judgment, holding that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publication absent a showing that the publication contained a false statement of fact which was made with actual malice. **Id.**

{16} Plaintiff notes that "as outrageous as the statements were in the offending article," the trial court in **Hustler Magazine,** nonetheless, allowed the libel claim to go the jury. Nevertheless, we note that the jury found that the ad parody could not reasonably be understood as describing actual facts about plaintiff. **Id.** The question of whether plaintiff's libel claim in **Hustler Magazine** should have been allowed to go to the jury was not before the Supreme Court. The true import of **Hustler Magazine** is not the trial court's denial of defendant's summary judgment motion, but its extension of the First Amendment protections, previously announced in **Sullivan,** to cases of intentional infliction of emotional distress.

{17} We conclude that the alleged defamatory statement is an editorial opinion on a matter of local political interest. One of the most fundamental privileges protected under the First Amendment is the right to free, uninhibited, political debate. The Week's Wash column is a criticism of city officials and the incoming administration. Public officials, such as plaintiff, are often the target of "vehement, caustic and unpleasantly sharp attacks." **New York Times Co. v. Sullivan,** 376 U.S. at 270, 84 S. Ct. at 720; **see Hustler Magazine v. Falwell.** While we empathize with those stung with the barbs of racial slurs or epithets, we must also recognize the vital role played by free, open and public discourse. First Amendment protections encourage and foster the dissemination of ideas and opinions. A publication is not deemed libelous simply because the opinion is expressed in terms of strong invectives, profanity or sarcastic language. **Marchiondo v. New Mexico State Tribune Co.** Further, fiery political dialogue, rhetoric, and public debate, including the use of epithets and hyperbole, are protected under the First Amendment of the Federal Constitution. **Id.**

{18} In **Communications Workers of Am., Local 8611 v. Archibeque,** 105 N.M. 635, 735 P.2d 1141 (1987) the supreme court held that use of characterizations such as "amoral," totally void of character," and *{*726}* "an embarrassment," in the context of a labor dispute, were rhetorical hyperbole and not misstatements of fact. **See also Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin,** 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974) (in context of labor dispute, use of term "scab," accompanied by highly derogatory definition, held to be "rhetorical hyperbole," protected by First Amendment); **Greenbelt Coop. Publishing Ass'n v. Bresler,** 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970) (in context of dispute over zoning variances, use of term "blackmail" to describe plaintiff's negotiation position was "rhetorical hyperbole" and could not reasonably be understood to impute crime of blackmail); **Kutz v. Independent Publishing Co.** (average reader would have no difficulty in reading "rabid environmentalist" to be expression of writer's opinion).

{19} Likewise, we are not convinced that the statements here could reasonably be interpreted as imputing criminal conduct to plaintiff. We believe that the column's use of

the term "Mexican Mafia" in the context of the debate over issues of public interest is rhetorical hyperbole. **See Communications Workers of Am. Local 8611 v. Archibeque.** Accordingly, we deem, as a matter of law, the statements to have been "opinion" and not "fact." Hence, we reverse the trial court and remand with instructions that defendants' summary judgment motion be granted and Mendoza's complaint be dismissed with prejudice. By virtue of our determination that the statements are protected as a matter of law, we need not discuss defendants' second issue.

{20} We remand with instructions, to dismiss Mendoza's complaint with prejudice.

{21} IT IS SO ORDERED.

LOREZO F. GARCIA, Judge, **WILLIAM** W. BIVINS, Judge RUDY S. APODACA, Judge, WE CONCUR

APPENDIX A

[SEE APPENDIX A IN ORIGINAL]

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1 During the municipal elections in Gallup, New Mexico, which preceded publication of the article, Munoz, candidate for office, referred to councilman George Hight as a "Big Zero." The candidate's remark, together with his subsequent apology, were previously published in The Gallup Independent.