

13-1004. Statement of fact: Fact defined; opinion contrasted.

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.

USE NOTES

In *Marchiondo v. Brown*, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982), the supreme court described the proper role of judge and jury in determining whether the alleged defamatory statement was or contained a statement of fact: Where the statements are unambiguously fact or opinion, . . . the court determines as a matter of law whether the statements are fact or opinion. However, where the alleged defamatory remarks could be determined either as fact or opinion and the court cannot say as a matter of law that the statements were not understood as fact, there is a triable issue of fact for the jury.

If the trial judge determines that, as a matter of law, the alleged defamatory statement is wholly opinion, then the court should direct a verdict for the defendant. If the judge determines that, as a matter of law, the statement is factual, there is no need to give this instruction; instead, the judge normally should omit any instruction or discussion of this issue.

Where the alleged defamation is made up of many statements, it is possible that some of the statements will be opinion as a matter of law, some will be factual as a matter of law and some will raise a jury issue as to whether they constitute facts or opinion. In such cases, the trial judge should make clear to the jury which portions of the statements the judge has ruled upon and which statements raise a jury issue as to their factual or nonfactual nature.

The bracketed instruction contained in the third paragraph should be given only when the judge determines that the alleged defamatory statement is or may be a statement of opinion, but further determines that the statement, if opinion, nonetheless may imply the existence of undisclosed facts:

It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication.

Restatement (Second) of Torts § 566 comment c (1977). In such cases, if the jury concludes that the statement is an opinion but that it implies the existence of

undisclosed facts, the requirement of a factual statement, described in this instruction, is satisfied.