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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 22-0512

DA 22-0512

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 47

MICHAEL L. GOGUEN,

Plaintiff, Appellee, and
Cross-Appellant,

v.

NYP HOLDINGS, INC.; ISABEL VINCENT;
and DOES 1 through 100,

Defendants and Appellants,

WILLIAM DIAL,

Defendant and Cross-Appellee.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-21-1382(A)
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

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For Amici The Reporters Committee for Freedom of the Press and Media Organizations:

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Argued: September 15, 2023
Submitted: September 26, 2023
Decided: March 12, 2024

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court

¶1 NYP Holdings and Isabel Vincent appeal the July 26, 2022 order denying their motion to dismiss entered in the Eleventh Judicial District Court, Flathead County. Goguen cross-appeals.

¶2 We review the following issues on appeal:

1. *Under Montana's choice of law rules, does New York law govern the fair report privilege?*

2. *Can the application of the fair report privilege be determined as a matter of law?*

3. *Did the District Court err when it determined Dial's statements were protected opinion?*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Micheal Goguen is an engineer and businessman who resides near Whitefish, MT. He has been the subject of two civil lawsuits alleging sexual and criminal misconduct. The first lawsuit occurred in 2016 and was filed by a former girlfriend, Amber Baptiste, who alleged Goguen had sexually assaulted her. The California Superior Court found for Goguen on his counterclaims of fraud and extortion and awarded Goguen $14 million in damages and enjoined Baptiste from repeating or publishing the defamatory statements. The second lawsuit was initiated in February 2021 by several former employees of Goguen's, including Matthew Marshall. Marshall worked for Amyntor, a private security company Goguen and Marshall formed in 2013. The Complaint alleged numerous instances of sexual and criminal misconduct by Goguen, including allegations of plotting murder, paying off law enforcement, and sexual assault. This lawsuit was filed while

Marshall was under federal indictment and being investigated for crimes related to his business dealings with Goguen. Marshall pled guilty to wire fraud, money laundering, and tax evasion on November 10, 2021. Marshall is currently serving a six-year prison term for those crimes and owes Goguen over $2 million in restitution for defrauding him. Marshall's lawsuit against Goguen was dismissed with prejudice on May 24, 2022.

¶4 The New York Post ("NYP") released an online article written by Isabel Vincent reporting on these two lawsuits on November 20, 2021, titled "Tech billionaire allegedly kept spreadsheet of 5,000 women he had sex with," followed by a print article the next day. The article details the allegations from both the Marshall and Baptiste Complaints, along with allegations from Goguen's former friend, Bryan Nash, and a quote from the retired Whitefish police chief, Bill Dial. While the article indicates Goguen won his countersuit against Baptiste, Marshall pled guilty to wire fraud and tax evasion, and Nash was convicted of stalking and extortion of Goguen, it mentions these facts after recounting the complainant's allegations against Goguen. The article concludes with a quote from Dial, referring to him as a local authority, wherein Dial said, "'This man has to be stopped . . . He's a billionaire a la Harvey Weinstein and Epstein. There's a lot of people in this community who know what he's about and they're afraid of him.'"

¶5 The day after the article was published, Goguen posted a statement on Twitter denying the allegations. That same day, NYP published a second article, based on Goguen's Twitter response, entitled "Tech billionaire Michael Goguen fires back at bombshell allegations." Goguen's legal counsel sent a demand letter to NYP on

November 21, 2021, asking for corrections to the article and a published apology. The NYP responded on November 24, 2021, claiming all statements in the article are privileged as a fair and accurate report of judicial proceedings. However, in its discretion, NYP chose to clarify two points in the article: (1) that Baptiste's allegations were found by the court to be false and defamatory and Baptiste was ordered to pay Goguen $14 million in damages, and (2) that it would change a photo caption to make it clear the allegations against Goguen were part of a civil suit and not a federal indictment.

¶6 Goguen then filed a Complaint against NYP, Vincent, and Dial for defamation in Montana's Eleventh Judicial District Court, Flathead County. The Complaint alleged the following statements from the *Post* article were false, defamatory, and unprotected by any privilege:

1. Goguen "transformed" Whitefish, Montana, "into his private fiefdom" and "a dark banana republic."
2. Goguen "controls local law enforcement."
3. Goguen maintains a "spreadsheet documenting his sexual encounters" with "5,000 women."
4. Goguen "outfitted a local bar he owns with a basement 'boom boom' room, which features a stripper pole" and used the room "to maintain women for the purpose of committing illicit sexual activity."
5. Goguen "could not obtain a security clearance with the US government because of the allegations of sexual abuse."

6. “Women tried to complain to police about Goguen’s alleged sexual assaults.”
7. Members of the Flathead County Sheriff’s Department were “on Goguen’s payroll.”
8. One woman “told a local police officer that Goguen had allegedly sexually assaulted her.”
9. “Pam Doe told Whitefish police that Goguen had sexually assaulted her” and “later recanted her story with police after signing a non-disparagement agreement with Goguen.”
10. “Threats to publicize unsubstantiated incidents of sexual impropriety unnerved former Sequoia Capital partner Michael Goguen and other Valley luminaries, according to a federal indictment.”
11. Amber Baptiste accused Goguen of “constant sexual abuse,” “countless hours of forced sodomy,” and demands that Baptiste refer to Goguen as “king” and “emperor.”
12. Amber Baptiste “underwent surgery for a ruptured anal canal after Goguen ‘forcibly sodomized her and left her bleeding and alone on the floor of a hotel room in a foreign country.’”
13. Amber Baptiste was restrained “from filing any similar suits against” Goguen.
14. Goguen “filed a counter-claim” against Baptiste.
15. Goguen “falsely told the FBI that Marshall did not have the requisite experience [and] had stolen and then laundered funds from Goguen.”

16. "[A]ccording to the civil complaint, Marshall spent the cash on Goguen's orders and was not reimbursed by Goguen."

¶7 NYP moved to dismiss on the basis that the article was protected by New York's fair report privilege and Dial moved to dismiss on the basis his communication was protected opinion. The District Court denied NYP's motion to dismiss, finding that Montana law applied to the issue of whether the article was privileged, and whether the article was a true and fair report absent malice was a question of fact for the jury. The District Court granted Dial's motion to dismiss, reasoning they were protected opinion statements and not sufficiently factual to imply undisclosed facts beyond those contained in the NYP article.

¶8 The District Court certified its Order as final pursuant to M. R. Civ. P. 54(b), and this Court found the certification to be in compliance with M. R. App. P. 6(6) on September 20, 2022.

STANDARD OF REVIEW

¶9 We review a district court ruling on a motion to dismiss *de novo*. *Turner v. City of Dillon*, 2020 MT 83, ¶ 6, 399 Mont. 481, 461 P.3d 122. A claim can be dismissed under M. R. Civ. P. 12(b)(6) if either it does not state a cognizable legal theory for relief or fails to plead sufficient facts that, if taken as true, would entitle the claimant to relief. *Stowe v. Big Sky Vacation Rentals, Inc.*, 2019 MT 288, ¶ 12, 398 Mont. 91, 454 P.3d 655. We construe all well-pleaded facts in the light most favorable to the plaintiff. *In re Estate of Swanberg*, 2020 MT 153, ¶ 6, 400 Mont. 247, 465 P.3d 1165.

DISCUSSION

¶10 In a society which takes seriously the principle that government rests upon the consent of the governed, the press plays a critical role in providing information to the people which allows citizens to form judgments and to intelligently govern. "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know." *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., Dissent). To preserve the "marketplace of ideas so essential to our system of democracy, we must be willing to assume the risk of argument and lawful disagreement." *James v. Board of Education*, 461 F.2d 566, 572 (2d Cir. 1972). Our First Amendment protections do not turn upon the "truth, popularity, or social utility of the ideas and beliefs which are offered." *N.A.A.C.P. v Button*, 371 U.S. 415, 445 (1963). As the Court has explained:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others of his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

¶11 Our commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, is in tension with the common law rule of libel that protects a person's reputation, and has thus created special problems for the press. Indeed, "whatever

is added to the field of libel is taken away from the field of free debate." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). Early in our history, the common law placed a high premium on the protection of a person's reputation and imposed strict liability for the publication of a defamatory statement. W.P. Keeton et al., *Prosser & Keeton on Torts*, section 113 at 804 (5th ed. 1984). When a statement is published a second or subsequent time, the statement has been republished. "The common law of libel has long held that one who republishes a defamatory statement [originally made by another] 'adopts' it as his own and is liable in equal measure to the original defamer." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 825 (1988). "'Every repetition of a slander is a willful publication of it, rendering the speaker liable to an action. Talebearers are as bad as talemakers.'" *McDonald v. Glitsch*, 589 S.W. 2d 554, 556 (Tex. Civ. App. 1979) (quoting *Houston Chronicle Pub. Co. v. Wegner*, 182 S.W. 45, 48 (Tex. Civ. App. 1915)).

¶12 The traditional rule reflects the principle that republishing a defamatory statement or article adds credibility to the original statement and therefore increases the damages attributable to the original statement. Members of the media who do no more than report an allegation originally published by a third party would, under the republication rule, be responsible for the truth of the communication. Thus, when a newspaper publishes a newsworthy account of one person's defamation of another, it would be charged with publication of the underlying defamation under the republication rule. Although the

common law exonerated one who published a defamation provided it was true,[1] a newspaper could not avail itself of the truth defense unless the truth of the underlying defamation were established. This had a "chilling effect on the reporting of newsworthy events occasioned by the combined effect of the republication rule and the truth defense . . . ." *Medico v. Time, Inc.*, 643 F.2d 134, 137 (3d Cir. 1981).

¶13 To ameliorate this chilling effect, the law has recognized the "fair report," "record," "reporter's," or "public eye" exception to the traditional common law rule of liability for the truth of republished matter. The exception has been superseded by state statute in varying forms in forty-seven states and, in general, reflects the judgment that the need in a self-governing society for free-flowing information about matters of public interest outweighs concerns over the uncompensated injury to a person's reputation. Thus, it is desirable, and the privilege so justified, when the "trial of causes . . . take[s] place under the public eye, not because the controversies of one citizen are of a public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Crowley v. Pulsifer*, 137 Mass. 392, 394 (1884). Thus, the chief advantage or public interest underlying the fair report privilege is the "security which publicity gives for the proper administration of justice." *Crowley,* 137 Mass. at 394. The Court, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975), explained:

[1] See Restatement (Second) of Torts, section 581A (1977).

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

¶14 The Restatement describes the fair report privilege as: "the publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported." Restatement (Second) of Torts § 611 (1977). Under the Restatement formulation the fair report privilege "immunizes the publication even when the publisher does not believe the defamatory statements reported or, indeed, knows them to be false and may therefore be said to have published with 'actual malice.'" Hon. Robert D. Sack, *1 Sack on Defamation § 7.3.5* (5th ed. 2017). Some jurisdictions "thus apply a privilege that is virtually absolute— 'door-closing.' So long as the accuracy and fairness tests have been met, both the publication's truth and the publisher's knowledge of its truth or motivation for publishing are irrelevant." *1 Sack on Defamation § 7.3.5.* The modern view of the fair report privilege "discards the search for malice, and simply requires that the report be fair and substantially accurate." *Rosenberg v. Helinski*, 328 Md 664, 677-78, 616 A.2d 866, 872-3 (1992).

¶15 In other jurisdictions, though, the privilege remains "conditional" and may be lost if the plaintiff demonstrates that the defendant acted with malice, spite, ill will, or a purpose to harm. While there remains the requirement that the republication be fair and accurate, these jurisdictions have narrowed the privilege available to the press by requiring that the republication be done without malice. This distinction often means that the presence or absence of actual malice is left for determination by a jury because it will normally turn on a question of fact. In these jurisdictions the fair report privilege operates as a *defense* to tort claims, but not an avoidance of trial. In contrast, where the fair report privilege is absolute and not characterized as a defense, the privilege operates as an *immunity* to the proceeding. See *Shanks v. Alliedsignal*, *Inc*., 169 F. 3d 988, 992 (5th Cir. 1999). In these jurisdictions where the privilege is absolute, communications falling under the privilege's protection "cannot constitute a basis of a civil action." *Shanks*, 169 F.3d at 992. The privilege mandates, instead, that all civil claims protected by the privilege be "extinguished." *Hugel v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP*, 175 F.3d 14, 17 (1st Cir. 1999).

¶16 Under New York law, "the privilege is absolute and is not defeated by allegations of malice or bad faith." *Kinsey v. The New York Times Co.*, 991 F.3d 171, 176 (2d Cir. 2021). The fair report privilege is codified in New York Civil Rights Law Section 74, and provides:

> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

> This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.

Consistent with the underlying purpose of the privilege, New York courts have explained that "[t]he press acts as the agent of the public, gathering and compiling diffuse information in the public domain. The press also provides the public with the information it needs to exercise oversight of the government and with information concerning the public welfare." *Gubarev v. BuzzFeed, Inc.*, 340 F. Supp. 3d 1304, 1314 (S.D. Fla. 2018). Thus, the fair report privilege "exists to protect the press as it carries out these functions." *Gubarev,* 340 F. Supp. 3d at 1314. See, e.g. *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 714 (4th Cir. 1991) (holding that the privilege exists so that the press is not punished for serving its basic function).

¶17 In contrast, Montana's fair report privilege is conditional and may be waived if the report was published with actual malice. Section 27-1-804, MCA, provides that for purposes of a defamation action, a "privileged publication" is one made in the proper discharge of an official duty, in any legislative or judicial proceeding, or:

> (4) by a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

Within the context of preliminary judicial proceedings where there has been no action by a judge, this Court has held that the scope of § 27-1-804, MCA, should be construed broadly consistent with the public's right to inspect public documents, § 2-6-102, MCA, and the right to public seatings in courts, § 3-1-312, MCA. *Cox v. Lee Enters.*, 222 Mont. 527, 530, 723 P.2d 238, 240 (1986). As a result, preliminary judicial proceedings which

have been filed in court but not judicially acted upon, remain within the scope of the privilege. *Cox*, 222 Mont. at 530. Additionally, this Court has recognized that "[w]hether a publication is privileged is a question of law for the court, where there is no dispute about the content of the proceedings on which the publication is based." *Lence v. Hagadone Inc. Co.*, 258 Mont. 433, 443, 853 P.2d 1230, 1237 (1993). Montana's privilege is narrower than New York's because the privilege can be overcome by a showing of malice on the part of the defendant. In Montana, the "qualified privilege exists only where the report was true, fair, and *published without malice*." *Cox*, 222 Mont. at 530 (emphasis supplied).

¶18 Against this background of the fair report privilege, we consider the issues at hand.

¶19 *Under Montana's choice of law, does Montana or New York law govern the fair report privilege?*

¶20 Preliminarily, NYP does not argue which state's law applies to Goguen's underlying defamation claim. Rather, NYP maintains that under the doctrine of depecage—the process of applying rules of different states based on the precise issues involved—New York has the most significant interest in having New York's fair report privilege applied. Whether we call it "depecage" or not, this Court adopted, without qualification, § 145 of the Restatement (Second) of Conflict of Laws in *Phillips v. GMC*, 2000 MT 55, ¶ 23, 298 Mont. 438, 995 P.2d 1002. Subsection (1) of § 145 specifically states "[t]he rights and liabilities of the parties *with respect to an issue* in tort are determined by the local law of the state which, *with respect to that issue*, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." (Emphasis supplied). Comment d of § 145 provides "courts have long recognized that they are not bound to

decide all issues under the local law of a single state . . . . Each issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states." Thus, pursuant to § 145, the threshold defamation issue and the applicability of defenses are separate issues, if they would be resolved differently in New York and Montana; that is, whether a statement is defamatory or invades the right to privacy is distinct from the issue of whether that statement is privileged. The requirement for an issue-based approach for choice of laws is set forth in the very first subsection of § 145. In *Phillips* we rejected the traditional lex loci delicti rule as too inflexible and adopted instead the "most significant relationship" of the Restatement's formulation, thus specifically adopting § 145. *Phillips*, ¶¶ 22-23. We conclude it would be ill-advised to divert from the requirements of § 145(1), after having adopted it in our precedent. Accordingly, here, consistent with § 145's conflict of laws analysis, we will consider the fair report privilege independently of the underlying defamation claim.

¶21 Montana's choice of law rules require the court to first determine if an actual conflict exists, and "if the laws and interests of the concerned states are not in conflict, the result is deemed a 'false conflict' or no conflict at all." 15A Corpus Juris Secundum "Conflict of Laws" § 31. A false conflict exists where application of either state's laws "are substantially the same and would produce the same results." *Mowrer v. Eddie*, 1999 MT 73, 294 Mont. 35, 979 P.2d 156, 161. An actual conflict of law exists only "if the choice of one forum's law over the other will determine the outcome of the case." 15A Corpus

Juris Secundum "Conflict of Laws" § 31. When there is no actual conflict, no further analysis is necessary, and the law of the forum state applies. *Modroo v. Nationwide Mutual Fire Insurance Co.*, 2008 MT 275, 345 Mont. 262, 191 P.3d 389, 395.

¶22 Here, Montana's fair report privilege provides a conditional defense to a defamation claim. The privilege not only considers whether the publication was fair and substantially accurate, but the privilege may be lost if the plaintiff demonstrates the defendant was guilty of actual malice. In contrast, New York's fair report privilege immunizes the republication even when the publisher does not believe the defamatory statements or knows them to be false. New York's fair report privilege is thus an absolute bar if the accuracy and fairness tests are met. The publisher's knowledge of its truth or motivation for publishing are irrelevant. We therefore conclude that an actual conflict of laws exists between Montana's and New York's fair report privilege, which substantially affects the outcome of the proceedings.

¶23 Next, Montana requires a court to identify the policies embraced in the law of each of the competing states with respect to the particular issue. On this score, we consider the Restatement of Conflicts § 6 factors:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

We observe that certain § 6 factors are less important in tort law, such as the protection of justified expectations of the parties and certainty, predictability, and uniformity of result. Restatement (Second) of Conflict of Laws, § 145 cmt. b.

¶24 The first factor considers the needs of the interstate and international systems. This factor makes clear that choice of law analyses should "seek to further harmonious relations between states and to facilitate commercial intercourse between them." Restatement (Second) of Conflict of Laws, § 6(2)(a) cmt. d. This factor does not lean towards the importance of any particular state's law, but rather "fosters harmonious relationships between states by respecting the substantive law of a particular issue litigated in a foreign jurisdiction." *Phillips*, ¶ 35. This factor supports the application of a state's law with the most significant relationship to the issue. As will be discussed *infra*, the fair report privilege protects the speaker; here, the application of New York's privilege would respect New York's significant policy interests and substantive law on the particular issue. In doing so, the harmonious relationship between the laws of New York and Montana would be fostered.

¶25 The second and third factors concern the relevant policies and interests of the forum state and other interested states in the determination of the particular issue. Restatement (Second) of Conflict of Laws, § 6(2)(b) and (c). These sections address whether applying

the law of a state would further the intended purpose of that law. *Phillips*, ¶ 37 (citing Restatement (Second) § 6 cmt. e.) Goguen argues these factors should weigh in favor of applying Montana law because "the underlying purpose of libel laws is to furnish a means of redress for defamation." *Lewis v. Reader's Digest Ass'n, Inc*., 162 Mont. 401, 406, 512 P.2d 702, 705 (1973). This misconstrues the relevant inquiry which addresses which state has the most significant interest for the particular issue, which is the fair report privilege and not the underlying defamation claim. Restatement (Second) of Conflict of Laws, § 145(1). Indeed, many of the cases Goguen cites as authority for applying Montana law to the privilege issue have determined the law for the underlying defamation claim, not the law of the fair report privilege. *Machleder v. Diaz*, 801 F. 2d 46, 52 (2d Cir. 1986) (applying New Jersey law to defamation claim); *Condit v. Dunne*, 317 F. Supp. 2d 344, 354 (S.D.N.Y. 2004) (applying California law to defamation claim); *La Luna Enters., Inc. v. CBS Corp*., 74 F. Supp. 2d 384, 389 (S.D.N.Y. 1999) (applying Florida law to defamation claim); *Woods Servs., Inc. v. Disability Advocates, Inc.*, No. 18-296, 2018 U.S. Dist. LEXIS 77752, *11-12 (E.D. Pa. May 8, 2018) (applying Pennsylvania law to defamation claim).

¶26 The purpose of New York's fair report privilege is to protect the media while they gather information needed for the public to exercise effective oversight of the government. *Idema v. Wager*, 120 F. Supp. 2d 361, 365 (S.D.N.Y. 2000). New York has a strong interest in encouraging unfettered expression by protecting certain speech within its borders. Thus, New York made its privilege absolute. *Williams v. Williams*, 23 N.Y. 2d 592, 597, 298

N.Y.S.2d 473, 476, 246 N.E. 2d 333, 337 (1969). "New York's interest in fixing the scope of a privilege applicable to conduct taking place within its borders is paramount." *Wilkow v. Forbes, Inc.*, 2000 U.S. Dist. LEXIS 6587 at *20 (N.D. Ill. May 12, 2000). "[T]he policy behind exempting those who speak in certain contexts is to encourage unfettered expression thereby ensuring that such statements do not subject the speaker to liability." *Vantassell-Matin v. Nelson*, 741 F. Supp. 698, 704 (N.D. Ill. 1990). "This policy would be wholly eviscerated if conduct occurring in New York was evaluated under another state's privilege laws." *Wilkow*, 2000 U.S. Dist. LEXIS 6587 at *20.

¶27 Significantly, the fair report privilege is meant to protect speakers, not provide a remedy to plaintiffs. *Wilkow*, 2000 U.S. Dist. LEXIS 6587 at *20. While Montana's fair report privilege was also created to protect the press, it was qualified—the communication must be "without malice"—so that more protection would be provided to citizens who may be subject to libel. Section 27-1-804, MCA; See *Cox v. Lee Enters*., 222 Mont. 527, 530, 723 P.2d 238, 240 (Mont. 1986). Other courts applying the most significant relationship test have found "the fair reporting privilege is meant to protect speakers, not provide a remedy to plaintiffs." *Wilkow v. Forbes, Inc*., 2000 U.S. Dist. LEXIS 6587 at *20. The conduct in question occurred in New York, and New York has the more significant interest in regulating the conduct of its citizens. See *Wilkow v. Forbes, Inc.*, 2000 U.S. Dist. LEXIS 6587 at *19-21. Although Montana does have an interest in protecting its citizens from defamation, the issue we are addressing under Montana's choice of law rules is the privilege and not the underlying defamation. While conduct in New York may impact

residents of other states, the conduct nonetheless took place in New York. The New York legislature has spoken through its privilege regarding its policy and the broad scope of protection to be afforded the media. See *Kinsey*, 991 F.3d at 178 (finding New York had stronger policy interest in defamation case with Maryland plaintiff and New York newspaper). We conclude that New York has a stronger interest in the determination of the privilege issue which is due, in part, because the privilege protects the speaker, New York's privilege provides more protection to the press than Montana's, and the conduct occurred in New York.

¶28 The fourth factor addresses protection of justified expectations. As mentioned previously, this factor is less important in tort law because justified expectations have less impact in tort cases. *Philips*, ¶ 62, *Buckles v. Flowtest, Inc*, 2020 MT 291, ¶ 28, 402 Mont. 145, 476 P.3d 422. This is particularly true in the area of negligence, because the parties frequently act without giving thought to the legal consequences of their conduct or to the law that may be applied. However, "[g]enerally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state." Restatement (Second), § 6 cmt. g. Here, NYP, as a holder of the privilege, had a justifiable expectation that New York law would be applied uniformly to its conduct. NYP conformed its conduct to the requirements of the New York fair report privilege.

¶29 The fifth factor addresses the basic policy underlying the law of the issue. Restatement (Second) § 6(2)(e). The Restatement drafters provide that this factor "is of

particular importance in situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local rules." Restatement (Second) § 6(2) cmt. h. "In such instances, there is good reason for a court to apply the local law of that state which will best achieve the basic policy." Restatement (Second) § 6(2) cmt. h. The difference between New York's fair report privilege and Montana's fair report privilege is not minor, as New York's is absolute while Montana's is qualified. N.Y. Civ. Rights Law § 74; § 27-1-804(4), MCA. When there is a more major difference between the laws like this, we have deemed this factor to be inapplicable. *Phillips*, ¶ 66, *Buckles*, ¶ 29.

¶30 Restatement (Second) § 6(2)(f) addresses certainty, predictability, and uniformity of results. Certainty and predictability are less important in an area of law like torts where parties are less likely to give advanced thought to the legal consequences of their actions. Restatement (Second), § 145 cmt. b. In a case such as this where the tortious conduct occurred in one state and the injury occurs nationwide, the certainty and predictability factor weigh in favor of applying the privilege consistently to the conduct occurring in New York. Applying New York law results in certainty and predictability for publishers. See *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1092 (S.D.N.Y. 1984) (finding New York law should apply so that publishers are subject to a uniform set of rules); *Condit v. Dunne*, 317 F. Supp. 2d 344, 354 (S.D.N.Y. 2004) (finding California had an interest in applying its defamation laws to the victim of defamation and New York had an interest in applying its privilege laws to the speaker).

¶31 The final factor, ease of determination and application, does not favor New York or Montana law on the privilege issue. Regardless of which state's law is applied, the privilege can be determined and applied without difficulty. The Restatement drafters provide "this policy should not be overemphasized" and simply "provide[s] a goal for which to strive." Restatement (Second) of Conflict of Laws § 6 cmt. j.

¶32 When we examine and apply these § 6 factors, every factor that is of consequence points towards New York and its law having the most significant relationship to the issue of the fair report privilege. We turn now to the other requirement of Montana's choice of law rules—application of § 145 considerations.

¶33 A court must examine the contacts of the respective jurisdictions to ascertain which has a superior connection with the occurrence and thus would have a superior interest in having its policy or law applied. *Phillips*, ¶ 29. Under Restatement of Conflicts § 145, the significant contacts are:

> (a) The place where the injury occurred;
>
> (b) The place where the conduct causing the injury occurred;
>
> (c) The domicile, residence, nationality, place of incorporation, and place of business of the parties; and
>
> (d) The place where the relationship, if any, between the parties is centered.

¶34 The first § 145 factor to be considered is the place of injury. This is Montana where Goguen is domiciled, though due to it being a national publication, the injury is not confined to Montana alone as Goguen's reputation purportedly suffered nationwide. See

Restatement (Second) Conflicts of Law § 145, cmt. e ("Situations do arise, however, where the place of injury will not play an important role in the selection of the state . . . such as in the case of multistate defamation, [where] injury has occurred in two or more states.")

¶35 The second § 145 factor considers where the conduct that caused the injury occurred. Here, NYP is domiciled in New York and the conduct causing the alleged injury occurred in New York. This factor is weighed more heavily when the conduct is privileged by the state where it occurred. See Restatement (Second) of Conflict of Laws, § 145(2), cmt. e ("the place where the conduct occurred is given particular weight . . . when the conduct was required or privileged by the local law of the state where it took place.")

¶36 The third factor considers the domicile or place of business of the parties. Goguen's domicile and residence is Montana, while the NYP's place of incorporation is Delaware, and its principal place of business is New York. Here, because the privilege protects the speaker, the conduct occurred in New York, and the speaker—the NYP—is located in New York, this factor weighs in favor of New York's privilege law.

¶37 The final factor is the place where the relationship between the parties is centered, if anywhere. This factor does not favor New York or Montana because there is no relationship between the parties aside from the publication and lawsuit.

¶38 The § 145 factors weigh in favor of applying New York's privilege law because the fair report privilege protects the media; the conduct occurred in New York; NYP's place of business is in New York; and the injury, while incurred in Montana, was not exclusive to Montana and occurred nationwide.

¶39 We conclude, based on the foregoing and after examining §§ 6 and 145, that Montana's choice of laws rules require we apply New York law to the fair report privilege at issue here.

¶40 *2. Can the application of the fair report privilege be determined as a matter of law?*

¶41 After concluding that New York law applies to the issue of privilege, we turn next to whether the complaint can be dismissed pursuant to New York law because the challenged statements are protected as a matter of law. To be protected by the fair report privilege, a publication must be substantially accurate. *Holy Spirit Ass'n. For Unification of World Christianity v. New York Times Co.,* 49 N.Y.2d 63, 67, 424 N.Y.S. 2d 165, 167 399 N.E. 2d 1185, 1187 (1979). "A report is 'substantially accurate' if, despite minor inaccuracies, it does not produce a different effect on a reader than would a report containing the precise truth." *Zerman v. Sullivan & Cromwell*, 677 F. Supp. 1316, 1322 (S.D.N.Y. 1988). A court with all the relevant documents before it may determine as a matter of law whether an article constitutes a fair and true report of a judicial proceeding. *Test Masters Educ. Servs. v. NYP Holdings, Inc.*, 603 F. Supp. 2d 584, 589 (S.D.N.Y. 2009); *Neiman Nix v. ESPN, Inc.*, 772 Fed. App'x. 807, 812 (11th Cir. 2019). If the report is ambiguous or implies graver misconduct than was alleged in the underlying proceeding, then the issue of whether it was a fair and true report protected by the privilege is a question of fact for the jury. *Fuji Photo Film U.S.A., Inc. v. McNulty*, 669 F. Supp. 2d 405, 411 (S.D.N.Y. 2009).

¶42 The District Court found under Montana's fair report privilege that contested statements 1 through 9, 11, 12, 15, and 16 were based on the Baptiste or Marshall Complaints and were preliminarily entitled to a qualified privilege if it was found by a jury that they were made without malice. The Court further found statement 10 was not based on any judicial proceeding and 13 and 14 were corrected by NYP for containing inaccuracies. On appeal, Goguen contends that whether the entirety of the article is protected by the privilege is a question of fact for the jury to resolve. NYP argues all the challenged statements are privileged as a matter of law and that the privilege warrants the dismissal of Goguen's Complaint. We find all the challenged statements were fair and substantially accurate reports of the proceedings and that the District Court erred in determining there were questions of fact that needed to be decided by a jury.

¶43 One of the threshold issues of whether the publication enjoys the privilege is whether the publication clearly attributes the contested statements to the official proceeding or document it is reporting on. *Adelson v. Harris*, 973 F. Supp. 2d 467, 482 (S.D.N.Y. 2013). When evaluating whether statements are a fair and true report of the proceedings, "[C]ourts must give the disputed language a fair reading in the context of the publication as a whole. Challenged statements are not to be read in isolation but, must be perused as the average reader would against the whole apparent scope and intent of the writing." *Celle v. Filipino Reporter Enters*, 209 F. 3d 163, 177 (2d Cir. 2000). Additionally, the language used "should not be dissected and analyzed with a lexicographer's precision" and "must be accorded some degree of liberality." *Holy Spirit Ass'n*, 49 N.Y. 2d at 68. From the very

beginning, the article is clear the allegations come from a civil complaint with its first headlines and captions saying so in both the print and online editions. ("A civil complaint alleges billionaire kept harem, had sex with 5,000 women and planned murder in small town").

¶44 First, we will address the statements associated with the Baptiste Complaint. Both statements 11 and 12 quote extensively from the Baptiste Complaint which accused Goguen of sexual abuse of Amber Baptiste. These statements gave the same impression of misconduct that the actual Baptiste Complaint did. *Daniel Goldreyer, Ltd. v. Van De Wetering,* 217 A.D. 2d 434, 436, 630 N.Y.S.2d 18, 22 (App. Div. 1995). Statements 11 and 12 fairly and accurately report what was contained in the Baptiste Complaint and are, therefore, protected as a matter of law pursuant to New York's fair report privilege.

¶45 Statements 13 and 14 come from the line, "Goguen won a countersuit in the three-year legal battle, securing a restraining order against Baptiste from filing any similar suits against him." Goguen obtained an injunction enjoining Baptiste from repeating or republishing her accusations against Goguen, not just from filing another suit. Statement 14 concerns a claim that Goguen won a countersuit against Baptiste. Goguen contends this statement is not an accurate report of the proceedings because it fails to say on what grounds Goguen won the countersuit. While maintaining that the original line was protected by the fair report privilege, NYP nonetheless corrected these details in an updated article that clarified the countersuit found Baptiste's allegations to be false and defamatory

and that she was restrained from repeating them in addition to being liable for extortion and fraud.

¶46 Accurate reporting on allegations is protected under the privilege even if the allegations turn out to be false and the party accused ultimately prevails. *Mulder v. Donaldson, Lufkin & Jenrette*, 161 Misc. 2d 698, 705, 611 N.Y.S. 2d 1019, 1023 (Sup. Ct. 1994), *Mulder v. Donaldson, Lufkin & Jenrette*, *aff'd*, 208 A.D. 2d 301 (N.Y. App. Div. 1995). Although Baptiste's allegations were found to be false, that does not defeat the privilege if it was a substantially accurate report. Additionally, misstatements will not defeat the privilege if they do not make the article substantially inaccurate in the full context of the article or if they are minor. *Miller v. Gizmodo Media Grp. LLC*, 407 F. Supp 3d 1300, 1312 (S.D. Fla. 2019). Pursuant to these rules, the statement regarding the restraining order is a minor misstatement, as the original statement still conveyed the main message that Goguen prevailed in the Baptiste lawsuit because her claims were not credible. The omission of the fact that Baptiste was enjoined from repeating the statements is not enough to render the statement substantially inaccurate. Especially considering the corrections, we conclude statements 13 and 14 are a fair and substantially accurate report of the proceedings and protected by New York's fair report privilege.

¶47 Next, we consider the Marshall Complaint and the several statements concerning Goguen's alleged interference with the police and their investigations. Statements 2, 7, and 9 relate to allegations of bribery or controlling the police. While these allegations are serious, they are fairly attributable to claims made in the Marshall Complaint which alleged

extensive bribery and control of the Whitefish police department by Goguen. In *Karedes*, the Second Circuit found there was a question of fact about the report being defamatory when the article suggested Karedes was responsible for tax issues, although the official audit did not explicitly draw such a conclusion and the auditor expressly disclaimed such a conclusion at a press conference. *Karedes v. Ackerly Grp., Inc.*, 423 F.3d 107, 118 (2d Cir. 2005). Here, however, the statements accurately convey the accusations contained in the Marshall Complaint that Goguen was bribing police officers. None of the statements suggest more serious misconduct than alleged in the Marshall Complaint. We conclude these statements fairly and accurately reported what was contained in the Marshall Complaint and are therefore protected as a matter of law by New York's fair report privilege.

¶48 We turn to statements 3, 4, 6, and 8 which report on the Marshall Complaint's allegations of sexual misconduct and abuse by Goguen. These allegations include keeping a "spreadsheet" of "5,000 women" Goguen allegedly had sex with, having a secret room in the bar he owned, and alleged sexual assaults of multiple women. Like the other statements, these allegations are serious, but the statements would not have a different effect on a reader than if the reader had read the Marshall Complaint itself. The statements here are distinguishable from other cases applying New York law where dismissal was not appropriate because the communications suggested misconduct beyond what was contained in the official proceedings. See *Bilinski v. Keith Haring Found., Inc*., 96 F. Supp. 3d 35, 49 (S.D.N.Y. 2015) (report saying parties agreed to remove "fake" artwork was

misleading because there was never any admission or explicit suggestion art was counterfeit); *Pisani v. Staten Island Univ. Hosp*., 440 F. Supp. 2d 168, 177-78 (E.D.N.Y. 2006) (hospital's press release "admitted" misconduct by the former executives when the settlement did not admit misconduct); *Wenz v. Becker*, 948 F. Supp. 319, 324 (S.D.N.Y. 1996) (statement not clearly attributed to lawsuit and omissions created impression of embezzlement rather than carelessness). Here, the Marshall Complaint clearly alleges multiples instances of sexual abuse and misconduct, and NYP's communications do not go further than summarizing those allegations while clearly attributing it to the Complaint. These communications are protected as a matter of law under New York's fair report privilege because they fairly and accurately report what was contained in the Marshall Complaint.

¶49 The remaining statements primarily relate to allegations concerning Marshall and Goguen's business dealings. Statements 5, 15, and 16 relate to Goguen's alleged inability to receive a security clearance, Goguen reporting Marshall's alleged crimes to the FBI, and misuse of Amyntor funds. Similar to the other statements, these allegations are clearly attributable to the Marshall Complaint and do not suggest misconduct beyond what was alleged in the Marshall Complaint.

¶50 Goguen contends statements such as these should not be protected because before the article was published, Marshall pled guilty to wire fraud, money laundering, and tax evasion related to his business dealings with Goguen. Goguen maintains this undermines the main tenets of Marshall's civil lawsuit against Goguen. However, there is no need for

media reporters to independently investigate allegations made in an official proceeding to receive protection under the privilege. *Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. New York*, 101 A.D. 2d 175, 183, 475 N.Y.S. 2d 383, 389 (App. Div. 1984). The article does clearly state that Marshall pled guilty to these charges and the plea included an admission that Marshall improperly used money for personal expenses, loans, and gifts.

¶51 In *Holy Spirit Association*, a report that drew from unverified intelligence reports released by the United States Government was protected by the fair report privilege even if "the use of the phrases 'stated as fact' and 'confirmed and elaborated' may denote to some degree, a sense of legitimacy which, in hindsight could be characterized as imprudent given the unverified nature of the reports." *Holy Spirit Ass'n.*, 49 N.Y.2d at 68. Although a report may not suggest more serious conduct than alleged in the underlying documents, the fair report privilege allows "some degree of liberality." *Holy Spirit Ass'n.*, 49 N.Y. 2d at 68. Omissions are an issue if they render the article untrue or unfair by implying graver misconduct than alleged in the underlying proceeding. *Miller*, 407 F. Supp. 3d at 1316. Had NYP completely omitted Marshall's guilty plea from its article, there is a possibility the omission may have implied graver misconduct than alleged in the underlying proceeding. However, because the article included these details along with the allegations from the complaint, it "convey[ed] the biased nature of the accusation and invite[ed] the reader to independently determine the credibility of the accusations." *Miller*, 407 F. Supp. 3d at 1316.

¶52 Statement 1 is similarly protected because, although it is not taken directly from any proceeding, it is a colorful characterization of what the Marshall Complaint alleged. Statement 1 opens the article that Goguen "transformed [Whitefish] into his private fiefdom: a dark banana republic . . . ." The District Court found this statement was a "colorful hyperbole" of what was alleged in the proceeding. Colorful descriptions that are still substantially true and based on proceedings are protected under the fair report privilege. *Akassy v. N.Y. Daily News*, No. 14 CV1725-LTS-JCF, 2017 U.S. Dist. LEXIS 9155, at *9 (S.D.N.Y. Jan. 23, 2017) (article describing defendant as "homeless, ascot-wearing sex fiend" and "wacko rapist" protected because substantially true based on court documents and partially expressions of opinion). Words and phrases such as "fiefdom" and "banana republic" are exaggerated hyperbole that relate to the allegations covered in the article. Statement 1 is likewise protected by the fair report privilege.

¶53 Lastly, statement 10 is protected by the fair report privilege despite the error of attributing it to a federal indictment. The District Court found this statement was not based on the proceedings and could not benefit from the fair report privilege. Statement 10 was a caption to a photograph contained in the story that read "Threats to publicize unsubstantiated incidents of sexual impropriety unnerved former Sequoia Capital partner Michel Goguen and other Valley luminaries, according to a federal indictment." Goguen argues this misleads the audience into thinking he was the subject of criminal charges when, in fact, the claims were alleged in a civil suit. However, in the corrected online article, NYP changed the caption to reflect the allegations were "according to a civil suit."

NYP argues this statement is attributable to the Marshall Complaint, specifically a paragraph stating that Goguen was terminated from Sequoia Capital shortly after Baptiste filed her complaint that alleged sexual abuse. NYP admits the original statement was incorrect but maintains no reasonable reader could have taken it to mean Goguen was subject to a federal indictment when the article mentions five separate times the allegations were part of a civil suit and states no criminal charges have been pursued against Goguen. Statements must be evaluated in reference to the entire context of the article and not in isolation. *Celle*, 209 F. 3d at 177. We agree a reasonable reader would not interpret that statement to mean Goguen had been federally indicted when read in context of the rest of the article. Further, the NYP article indicates that a Sequoia spokesperson represented that Goguen was terminated from the firm despite the unsubstantiated nature of the allegations. We conclude that statement 10, within the context of the entire article, could not be interpreted to mean Goguen was federally indicted.

¶54 In conclusion, all the statements are substantially based on the judicial proceedings of the Baptiste and Marshall cases and do not suggest more serious misconduct than already alleged in those proceedings. Any errors in the communications are minor and do not suggest worse conduct than alleged in the Complaints. Moreover, NYP corrected the minor misstatements related to the Baptiste litigation. Any colorful hyperbole in the article is protected as it does not suggest more serious facts than alleged in the underlying proceedings. We therefore conclude that all the contested statements are privileged as a matter of law under New York's fair report privilege.

¶55 *3. Did the District Court err when it determined Dial's statements were protected opinion?*

¶56 The District Court determined Dial's statements featured in the NYP story were protected opinion and not defamatory under Montana law. The statements at issue appeared in the NYP article as follows:

> "This man has to be stopped," said Bill Dial. The retired Whitefish police chief sued Goguen in December 2019 for alleged interference in his own investigation. "He's a billionaire a la Harvey Weinstein and [Jeffrey] Epstein. There's a lot of people in this community who know what he's about and they're afraid of him."

¶57 Whether statements are protected opinion is "a matter which a court can and should rightfully determine upon a motion for summary judgement." *Hale v. City of Billings*, 1999 MT 213, ¶ 22, 295 Mont. 495, 986 P.2d 413. Statements that cannot reasonably be understood to state actual facts about someone are protected by the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S. Ct. 2695 (1990). Expressions of opinion generally are not capable of being considered defamatory and therefore are not actionable. *McConkey v. Flathead Elec. Coop*, 2005 MT 334, ¶ 49, 330 Mont. 48, 125 P.3d 1121. There is a difference between an opinion based on expressly stated facts and one based on implied, undisclosed facts. *Herring Networks, Inc. v. Maddow*, 8 F. 4th 1148, 1159 (9th Cir. 2021). If an opinion is based on expressly stated facts, then it can only be defamatory if the facts themselves are false and defamatory. *Herring Networks*, 8 F. 4th at 1159. "The First Amendment protects statements of opinion on matters of public concern where they do not contain a provable false factual connotation, or where they cannot reasonably be interpreted as stating actual facts about an individual." *Hale,* ¶ 23.

If facts are not disclosed and there can be a reasonable inference that the opinion is based on undisclosed facts capable of defamatory meaning, then the opinion is not constitutionally protected and can be considered defamatory. *Hale*, ¶ 27 (citing Restatement (Second) of Torts § 566 and cmt. c. (1977)).

¶58 Dial's statements must be judged according to the context of the article in which they were published. Goguen argues on appeal that Dial's statements should be judged in isolation at the time they were conveyed to the reporter. The context in which the statements appear is a significant factor in determining whether the statement may be protected opinion. *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970); *Knievel v. ESPN, Inc.,* 223 F. Supp. 2d 1173, 1178 (D. Mont. 2002). To distinguish between statements of facts and statements of opinion, a court is to consider "the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made." *Milkovich*, 497 U.S. at 24. Because context is essential to understanding a challenged statement, "not all statements that could be interpreted in the abstract as criminal accusations are defamatory." *Knievel v. ESPN*, 393 F.3d 1067, 1075 (9th Cir. 2005). Sarcastic or hyperbolic language will not be found to be an actionable assertion of fact. *McConkey*, ¶ 48.

¶59 To begin, we fail to see how comparing Goguen "a la Harvey Weinstein and Epstein" can be an actual fact capable of being proven false. Further, knowing what Goguen "is about" and that some people are "afraid of him" is similarly not an actual fact, much less a fact capable of being proven false. Statements that cannot reasonably be

understood to state actual facts about someone are opinions protected by the First Amendment. *Mikovich*, 497 U.S. at 20.

¶60 Moreover, Dial's statements comparing Goguen to Weinstein and Epstein not only do not assert the existence of undisclosed facts, but, considered within the context of the entire article, are hyperbolic. We have previously held in *McConkey* that statements such as "management has led the co-op . . . into one h[ell] of a mess" are hyperbolic and not defamatory. *McConkey*, ¶ 48. Other courts have generally found comparisons to unsavory public figures are not defamatory and fit within the confines of rhetorical hyperbole. See *Gilbrook v. City of Westminster*, 177 F.3d 839, 862 (9th Cir. 1999) (determining calling plaintiff a "Jimmy Hoffa" hyperbolic and not a factual assertion plaintiff committed a crime); *Clark v. Time Inc.*, 242 F. Supp. 3d 1194, 1222-23 (D. Kan. 2017) (finding comparison of manager to "Vlad the Impaler" protected hyperbolic opinion); *Holy Spirit Ass'n. v. Harper & Row Publishers*, 101 Misc. 2d 30, 33, 420 N.Y.S. 2d 56, 59 (N.Y. Sup. Ct. 1979) (comparison of church group "Moonies" to Nazis expression of opinion).

¶61 In cases where comparison with a public figure or entity was found defamatory, there were additional assertions that made the statement more than opinion. In *Hadley*, the statements regarding the plaintiff being "a [Jerry] Sandusky waiting to be exposed" and "[c]heck out the view he has of [the elementary school] from his front door" were defamatory because they implied the commission of a specific crime. *Hadley v. Doe*, 2014 IL App (2d) 130489, ¶ 27, 382 Ill. Dec. 75, 12 N.E. 3d 75. It was not just the comparison, but the implication that he would be "exposed" and further implication he had access to

children which suggested Hadley had committed the crime of child molestation. *Hadley*, ¶ 27. Similarly, in *Roots*, we held summary judgment was inappropriate when there was a genuine issue of material fact as to whether Roots was an organizer for the KKK, which was a factual statement and not just hyperbolic opinion. *Roots v. Mont. Human Rights Network*, 275 Mont. 408, 913 P.2d 638, 641 (1996).

¶62 Dial's statements comparing Goguen to Weinstein and Epstein do not contain additional factual assertions and are more of a hyperbolic comparison to unsavory public figures. As the District Court reasoned, when read in context of the rest of the article, Dial's statements are based on the allegations and facts stated in the article and not undisclosed facts. Dial's statements comparing Goguen to other billionaires accused of sexual assault and claiming the people of Whitefish know of these rumors is attributable to the contents of the article and its report of the Baptiste and Marshall Complaints. Dial's status as a former police chief is insufficient to imply undisclosed facts beyond what has been stated in the article.

¶63 Finally, Dial's statement that people in Whitefish are "afraid" of Goguen and Goguen "needing to be stopped" are only vague assertions by Dial. For a statement to be libelous under Montana law, the statement must be false and expose the person to "hatred, contempt, ridicule, or obloquy or causes a person to be shunned or avoided or that has a tendency to injure a person in the person's occupation." Section 27-1-802, MCA. "If the alleged statements are not defamatory, it is unnecessary for a jury to decide if they are false." *McConkey*, ¶ 44. While Goguen is correct that Dial's statement people in Whitefish

are afraid of Goguen is either true or false, the statement is a vague assertion that some people in Whitefish have negative feelings about Goguen, which is not enough to be defamatory. To be defamatory, words must injure the person without the aid of extrinsic proof; it is not enough that the language is "unpleasant, annoying or irksome and subjects the person to jests or banter." *Anderson v. City of Troy*, 2003 MT 128, ¶ 14-15, 316 Mont. 39, 68 P.3d 805. "Terms which basically convey only a vague message that someone is a 'bad person' are not slanderous." *Anderson,* ¶ 17. Dial's statements, as the District Court determined, are only vague implications that Goguen is a bad person the people of Whitefish do not like.

CONCLUSION

¶64 The District Court erred in its choice of laws analysis when it did not conclude that New York had the most significant interest in having its fair report privilege applied to the proceedings. The District Court additionally erred when it determined that the issue of privilege could not be decided until a jury determined whether the article was a fair and accurate report of the proceedings, done without malice. Lastly, the District Court correctly determined that Goguen's cross-motion against Dial should be dismissed because Dial's statements were protected opinion. The District Court's order on the parties' motions to dismiss is reversed in part and affirmed in part.

¶65 We conclude as a matter of law under New York's fair report privilege that the disputed statements fairly and accurately report on an official proceeding. NYP is entitled, under New York Civil Rights Law Section 74, to dismissal of Goguen's complaint.

Further, as a matter of law, we conclude Dial's statements were opinion, and therefore not actionable.

/S/ LAURIE McKINNON

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE