

# THE DIFFICULTY IN WINNING RESTAURANT DEFAMATION CASES

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## I. INTRODUCTION

Before going out for a nice dinner with your family or friends, you want to choose a nice restaurant, which has good quality food, a nice atmosphere and pleasant service. How does one find out about these things regarding a particular restaurant? Word of mouth, asking a friend, looking on the Internet, or listening to a food critic on the radio are all popular ways, but the most often used method is reading a food critic's article in a newspaper or magazine. Food critics write about their past experience and knowledge of the particular restaurant being reviewed, including what they thought about the service, décor, atmosphere and quality of food. They express their opinions and views of their dining experience.

Restaurant reviews have become more and more popular in the past twenty years and today there is even a yearly guide specifically published on the subject of restaurant reviews.<sup>2</sup> When a review is positive, restaurant owners are satisfied and the critique usually brings in additional business. When a review is negative, it may turn away potential customers, causing the restaurant to lose business or otherwise cause damage to the restaurant. The owners may be displeased about the negative review and thereafter may seek compensation for such negative comments through the legal system.

In the past few years, restaurant reviews have generated a substantial amount of litigation and have led to an interesting legal dilemma. The major problem that restaurants face in winning a legal challenge is that restaurant reviews are considered to be subjective and courts are

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<sup>2</sup> ZAGAT SURVEY: NEW YORK CITY RESTAURANTS 2004 (Curt Gathje & Carol Diuguid eds., 2003), *available at* <http://www.zagat.com> (reputed to be the world's leading provider of consumer survey-based dining).

reluctant to describe them as anything other than opinion. As stated by the Second Circuit Court of Appeals, “Restaurant reviews are also the well recognized home of opinion and comment.”<sup>3</sup> The very nature of a restaurant review, similar to a movie or theater review constitutes the subjective opinion of the reviewer.<sup>4</sup>

This comment will examine the problems that restaurants face in winning a defamation lawsuit. Part II of this comment will present an overview of defamation law and the distinctions between opinion and facts. It will provide a platform from which to analyze restaurant defamation cases. Part III will discuss and explore the problems that restaurants have faced in a number of lower court cases which have addressed these issues. This section will focus in on the fact that under current law it is almost impossible for a restaurant owner to prevail in a defamation suit. Part IV will critique and evaluate the current standards applicable to restaurant defamation claims and discuss the relevant policy considerations. Part V will conclude with a summary of the issues presented and a discussion on where the courts stand today.

## II. BACKGROUND

Defamation is a communication that tends to damage the plaintiff’s reputation. It includes any publication which exposes a person to distrust, hatred, contempt, ridicule, or anything that may impute incompetence, incapacity, or unfitness in the performance of an individual’s trade, occupation or profession.<sup>5</sup> The elements of defamation include a false and defamatory communication, regarding the plaintiff, which is published to a third party. In addition, fault and damages must generally be proven.

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<sup>3</sup> Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 227 (2d Cir. 1985).

<sup>4</sup> *Id.*

<sup>5</sup> George L. Blum, J.D., Annotation, *Criticism or Disparagement of Dentist’s Character, Competence, or Conduct as Defamation*, 120 A.L.R.5th 512 (2004).

The law of defamation has changed drastically since 1964. Traditionally, libel was considered a category beyond the protection of the First Amendment. “As a result, libelous statements were not constitutionally protected, regardless of whether they were expressions of opinion, innocently mistaken statements of fact, or knowingly false statements.”<sup>6</sup> Nonetheless, not all defamatory statements were considered to be actionable. Some statements were still privileged, but the source of such privilege was not the Constitution, but rather the common law.<sup>7</sup>

In 1964, the focus turned to the possible First Amendment value of protecting some defamatory communication. In *New York Times Co. v. Sullivan*, the United States Supreme Court held that a public official cannot recover for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” – that is, either with knowledge that it was false or with reckless disregard of the truth or falsity of the statement.<sup>8</sup> However, the Court did not define who is to be considered a public official.

The United States Supreme Court, in *Rosenblatt v. Baer*,<sup>9</sup> formulated a test to determine who is to be considered a public official. The test is whether “the position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all governmental employees.”<sup>10</sup> Public officials are persons “who have, or

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<sup>6</sup> Jeffrey E. Thomas, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CAL. L. REV. 1001, 1004 (1986).

<sup>7</sup> Jeffrey L. Kirchmeier, *The Illusion of the Fact-Opinion Distinction in Defamation Law*, 39 CASE W. RES. L. REV. 867 (1989) (“The common law, however, recognized in defamation actions a qualified privilege of “fair comment” upon the qualifications and conduct of public officers and public employees. This privilege encompassed the publication of matters of general public concern.”) Today, no such privilege is needed, because opinions are not actionable, as a matter of constitutional law.

<sup>8</sup> 376 U.S. 254, 279-80 (1964).

<sup>9</sup> *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (involving comments about the supervisor of a county recreation area); *see also* *Krutech v. Schimmel*, 272 N.Y.S.2d 261 (N.Y. Sup. Ct. 1966) (involving a part time accountant for public waterworks), *rev'd*, 278 N.Y.S.2d 25 (N.Y. App. Div. 1967) (holding that the plaintiff failed to submit evidence of actual malice and therefore the defendant’s motion for summary judgment should have been granted).

<sup>10</sup> *Id.*

appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”<sup>11</sup>

Three years later, in *Curtis Publishing Co. v. Butts*, the Court determined that the *New York Times* test concerning public officials should be extended to include criticism of public figures.<sup>12</sup> Public figures include pervasive public figures, defined as those who occupy a position which has continuing news value, limited purpose public figures, those who voluntarily thrust themselves into a particular controversy and public personalities, those who seek the public stage for entertainment purposes.<sup>13</sup> The rule concerning public officials was extended to include public figures because public figures assume the risk of being publicly scrutinized and they have the opportunity for rebuttal through their readily available access to the media.<sup>14</sup> Additionally, the Court extended the constitutional privilege to protect defamatory criticism of nonpublic persons “who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.”<sup>15</sup>

A recurring issue that comes up in restaurant defamation cases is how to classify a restaurant for the purposes of food reviews.

The restaurant may be a relatively small family-operated business, with little resemblance to large corporations that have substantial media access. Yet at the same time, it is quite arguable that in opening its doors to serve the public food, it thrusts itself into the public arena for the limited purposes of critiques of its fair.<sup>16</sup>

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<sup>11</sup> VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ’S TORTS 915 (Robert C. Clark et al. eds., 10th ed. 2000) (quoting *Rosenblatt*, 383 U.S. 75).

<sup>12</sup> 388 U.S. 130 (1967).

<sup>13</sup> SCHWARTZ, KELLY & PARTLETT, *supra* note 11, at 912-915.

<sup>14</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-48 (1974).

<sup>15</sup> *Gertz*, 418 U.S. at 336-37 (quoting *Butts*, 388 U.S. at 164 (Warren, C.J., concurring)).

<sup>16</sup> RODNEY A. SMOLLA, LAW OF DEFAMATION § 2:98.50 (2d ed. 2004).

Restaurants are commonly held to be public figures, requiring them to prove actual malice in order to recover damages for an allegedly defamatory review.<sup>17</sup> Courts are reluctant to classify restaurants as private figures, because restaurants are considered to be an enterprise of public interest<sup>18</sup> and a review of a restaurant is of concern to the public.

Moreover, the distinction between opinion and fact was another hurdle the courts had to overcome. The Supreme Court further expanded on defamation law in *Gertz v. Robert Welch, Inc.*<sup>19</sup>, where the Court, in *dictum*, first distinguished between fact and opinions by saying, “Under the First Amendment there is no such thing as a false idea.”<sup>20</sup> If this is true, it follows that ‘ideas’ are protected by the First Amendment because they cannot fall into the category of actionable statements – calculated falsehoods. In addition, opinions are considered to be ‘ideas’ and generally, one cannot be liable for expressing an opinion.<sup>21</sup> Here, Gertz was accused of having a criminal record, of being a ‘Leninist’ and a ‘Communist-frontier,’ and of helping to ‘frame’ a Chicago policeman convicted of murder.<sup>22</sup> These statements contained serious inaccuracies and the implication that Gertz had a criminal record was false.<sup>23</sup> There was no effort made to verify the charges against Gertz. Consequently, the Supreme Court found in favor of Gertz and held that the *New York Times* actual malice standard did not apply because Gertz

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<sup>17</sup> See, e.g., *Twenty-Five East 40th Street v. Forbes*, 322 N.Y.S.2d 408 (1971); *Mr. Chow of New York*, 759 F.2d 219 (2d 1985); *Terillo v. New York Newsday*, 519 N.Y.S.2d 914 (1987); *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82 (Nev. 2002).

<sup>18</sup> *Steak Bit of Westbury, Inc. v. Newsday, Inc.*, 334 N.Y.S.2d 325, 330-31 (N.Y. Sup. Ct. 1972) (holding that a restaurant which serves food to the general public is involved in an enterprise of public interest and therefore must prove actual malice). In an extremely low number of cases, the court may find that a restaurant is not a public figure, but a “private person,” and in such cases, the restaurant only has to prove negligence to recover damages, not actual malice. See *Havalunch v. Mazza*, 170 W.Va. 268 (1981) (holding the restaurant that was reviewed was not of sufficient public concern to warrant its removal from the normal status of a private person because it neither solicited reviews nor held itself out as a place of particular interest or culinary quality).

<sup>19</sup> 418 U.S. 323 (1974).

<sup>20</sup> *Id.* at 339-40.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 326.

<sup>23</sup> *Id.*

was a private individual.<sup>24</sup> Even though Getz was classified as a private individual, the Court held that the State had to require some fault. “The States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”<sup>25</sup>

Furthermore, the issue of opinion versus fact was dealt with in *Milkovich v. Lorain Journal Co.*,<sup>26</sup> where the Court distinguished facts, which are capable of being proven true or false, from opinions, which are constitutionally protected. “In order to be actionable, a defamatory statement must assert or imply a provably false fact.”<sup>27</sup> Only statements capable of being proven true or false are actionable. The analysis must disentangle assertions of fact with statements that do not assert facts. Expressions of opinion often imply an assertion of objective fact and when those assertions can be proven true or false, they may be actionable.<sup>28</sup> Here, a newspaper published a column which implied that Milkovich, a high school wrestling coach, lied under oath at a judicial proceeding.<sup>29</sup> The connotation that Milkovich committed perjury is sufficiently factual and can be proven true or false, and therefore the statements may be actionable.<sup>30</sup>

Although it is made clear that expressions of opinion are constitutionally protected, the determination of whether a statement is fact or opinion is a difficult one and the law may seem murky. “It has been suggested that one reason for the distinction between fact and opinion is that statements of fact have greater potential for influence and hence are likelier to damage reputation

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<sup>24</sup> *Id.* at 352 (Reasoning that Getz did not thrust himself into the public stage, nor did he engage the public’s attention).

<sup>25</sup> *Id.* at 347.

<sup>26</sup> 497 U.S. 1 (1990) (holding that a reasonable reader could conclude that the statements in the Diadiun column imply an assertion that Milkovich perjured himself in a judicial proceeding).

<sup>27</sup> *Id.* at 19-20.

<sup>28</sup> *Id.* at 18.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.* at 21.

than mere expressions of opinion, which are more readily discounted by the reader or listener.”<sup>31</sup> Whether a statement is viewed as a fact or opinion must be made from the perspective of an ordinary reader.<sup>32</sup> In relation to restaurant reviews, the writer is likely to be expressing his opinion of his personal belief. There must be a distinction between someone who is expressing an opinion of what his experiences were and someone who is writing an article with actual malice. The reader of a restaurant review will likely understand that the review contains the opinion of one person and opinions differ from one person to another. Additionally, speech will be protected if it is rhetorical hyperbole, vigorous epithets, or lusty and imaginative expression.<sup>33</sup> “Public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation.”<sup>34</sup>

The plurality opinion in *Ollman v. Evans* identified four factors that have been used to help resolve the question of whether a statement is one of fact or opinion.<sup>35</sup> They include (1) whether the statement was precise or ambiguous and indefinite, (2) whether the statement is verifiable, (3) an examination of the general context in which the statement appears, and (4) a consideration of the broader context in which the statement appeared.<sup>36</sup> This defamation action arose out of the publication of an article entitled “The Marxist Professor’s Intentions.”<sup>37</sup> It discussed Mr. Ollman’s research and his writings. Applying these four factors, the Court found that the average reader would expect the columnist to make strong statements and therefore they would regard the column as nothing more than the writer’s opinion.<sup>38</sup> Additionally, the column

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<sup>31</sup> *Immuno A.G. v. Moor Jankowski*, 549 N.Y.S.2d 938, 941 (1989) (citing Note, *Fair Comment*, 62 Harv. L. Rev. 1207, 1213 (1949)).

<sup>32</sup> *Mr. Chow of New York*, 759 F.2d at 224.

<sup>33</sup> *Id.* at 228-29.

<sup>34</sup> 497 U.S. at 20 (citing Falwell at 53-55).

<sup>35</sup> 750 F.2d 970 (D.C. Cir. 1984).

<sup>36</sup> *Id.* at 979-84.

<sup>37</sup> *Id.* at 971.

<sup>38</sup> *Id.* at 986-87.

was printed on the editorial or Op-Ed page, suggesting that the statements found there are not “hard” news like those printed elsewhere in the news section.<sup>39</sup> Using these four factors, the court was enabled to perform the task of determining whether a reasonable reader would believe the communication to be of fact.<sup>40</sup>

Restaurant reviews are important to the public to convey expressions of opinion and thoughts about a particular restaurant. They serve a central purpose and function of conveying information the public wants to know before patroning a particular establishment. They convey the reviewer’s opinion of the food, décor, atmosphere, and the service of the restaurant, which are controlled by personal tastes. The communication contested in a restaurant review must be read in context and considered as a whole, including the content, tone and purpose. An average reader approaches a review with the knowledge that it contains only one person’s view of the establishment and therefore courts using the four *Ollman* factors<sup>41</sup> are likely to determine whether a restaurant review contains only the opinion of the writer or provable facts that may be actionable.

### III. ANALYSIS OF RESTAURANT REVIEWS

Restaurant reviews are increasing in popularity and have been recognized throughout the world as a way to convey the critic’s opinion of the restaurant reviewed. Today, restaurant reviews are found in magazines, on the internet, talked about on the radio, and written about in local newspapers.<sup>42</sup> Certain newspapers even have allocated specific sections solely for the

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<sup>39</sup> *Id.*

<sup>40</sup> Some state high courts, such as the New York Court of Appeals, have held that their state constitution provides a greater protection of First Amendment rights than the federal constitution. *See, e.g., Immuno*, 549 N.Y.S.2d 938 (1989).

<sup>41</sup> *Ollman*, 750 F.2d at 979-84.

<sup>42</sup> *See, e.g., Peter M. Gianotti, Japanese Fare with a Flair*, *NEWSDAY* (Nassau Edition), Feb. 20, 2005, § G, at 14; Adam Platt, *Vento Frustration*, *NEW YORK*, June 14, 2004, at 134.



purpose of food topics and restaurant reviews.<sup>43</sup> Due to the increasing popularity of restaurant reviews, there are now magazines and books specifically written concerning restaurant reviews and opinions of past customers.<sup>44</sup>

The preservation of freedom to write about restaurants, to criticize or compliment, is another form of safeguard, and is a vital channel through which the public's right to know is protected. Therefore, even if commentaries in a newspaper about a public restaurant's service and food are false, there is protection from defamation liability unless it is shown that the statements were motivated by malice or made with reckless disregard.<sup>45</sup>

When restaurant reviews do not portray a certain restaurant in a favorable light, the owners may bring a defamation lawsuit. They may seek to be compensated for the loss of business or the ensuing damages resulting from the negative review. There are two issues that most frequently arise when restaurants sue for defamation. The first issue is that reviews are classified as opinions and such statements are not capable of being proven true or false and therefore cannot be held actionable. The second issue is that restaurants are classified as public figures and consequently they must prove actual malice.

### **A. Opinion v. Fact**

An opinion is one's subjective belief and a review of a restaurant is likely to be the reviewer's expression of opinion. For statements to be actionable they must be capable of being proven true or false. It is impossible to prove an opinion to be true or false, because opinions are the beliefs, thoughts, or inferences of one's subjective viewpoint. Statements of opinion cannot

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<sup>43</sup> Newsday (Nassau Edition), Feb. 20, 2005, § G, at 14.

<sup>44</sup> See, e.g., ZAGAT SURVEY: NEW YORK CITY RESTAURANTS 2004 (Curt Gathje & Carol Diuguid eds., 2003), available at <http://www.zagat.com>; See also Adam Platt, *Vento Frustration*, New York, June 14, 2004, at 134.

<sup>45</sup> *Steak Bit of Westbury*, 334 N.Y.S.2d at 331.

be defamatory because “there is no such thing as a false idea.”<sup>46</sup> An assertion that cannot be proven false cannot be held libelous; therefore, opinions cannot be held libelous. You cannot be held liable for expressing your opinion, however unreasonable it may be.<sup>47</sup>

In determining whether a statement is an opinion or fact, the statement must be read through the eyes of an ordinary reader and looked at from the context and circumstances surrounding the statement.<sup>48</sup> When looking to the circumstances of a critique, the term “review” must be examined. It conveys to the reader that the statement is an expression of opinion.<sup>49</sup> More often than not, a restaurant reviewer is expressing his careful honest opinion and it is likely that they are expressions of a purely subjective nature. Courts have consistently held that when a review is read as a whole and in the proper context, the review is likely to be an expression of the reviewer’s opinion.<sup>50</sup>

In *Mashburn v. Collins*,<sup>51</sup> a restaurant owner brought a defamation claim against the author of a newspaper column devoted to reviews of eating places. The critique began by saying, the food “T’aint Creole, t’aint Cajun, t’aint French, t’aint country American, t’aint good.”<sup>52</sup> The court said these statements are mainly evaluations of a purely subjective nature. The critique went on to say, “The menu was a travesty of pretentious amateurism.”<sup>53</sup> The court stated, “It is clear from a reading of the whole column that these expressions of opinion are based upon facts stated within the publication.”<sup>54</sup> Accordingly, the statements were designated as opinion, rather than statements of fact. Although there were a number of statements describing

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<sup>46</sup> *Gertz*, 418 U.S. at 339-40.

<sup>47</sup> *Mr. Chow of New York*, 759 F.2d at 224-25.

<sup>48</sup> *Mashburn v. Collin*, 335 So.2d 879, 885 (La. 1977).

<sup>49</sup> *Pegasus*, 57 P.3d at 89.

<sup>50</sup> *Id.* at 93-94; *see also* *Greer v. Columbus Monthly Publishing Corp.*, 4 Ohio App.3d 235, 238-39 (1982).

<sup>51</sup> *Mashburn*, 335 So.2d at 881.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 888.

<sup>54</sup> *Id.*

the taste and appearance of the restaurant's food that were sharply critical, they amounted to no more than the expression of the critic's opinion that the food was not great.<sup>55</sup> The review could not cause an ordinary reader to conclude that the statements were facts suggesting unsanitary conditions or an unclean environment.<sup>56</sup> The statements, taken in context, would clearly appear to be expressions of opinion and no more. The court concluded that when read as a whole, a reasonable reader would regard the statements as expressions of the writer's opinion and not statements of fact.<sup>57</sup>

Similarly, in *Greer v. Columbus Monthly Publishing Corp.*,<sup>58</sup> restaurant owners brought a libel action against a publishing corporation based on an article critical of their restaurant. The review began by describing the restaurant as having "a geographical schizophrenia," which is merely a cute way of stating that its décor is at odds with its menu.<sup>59</sup> It went on to describe the food using hyperboles, such as the fish "tasted like old ski boots," used to indicate that the reviewer found the fish to be dry and tough.<sup>60</sup> Commenting on the quality of a restaurant or its food constitutes the opinion of the reviewer. The offending parts of the article were considered to be opinion, sometimes in hyperbole form and a person reviewing a restaurant has a right to express an honest opinion, although it may be controversial, without it being libelous. Criticism, by its nature, is controversial, but it does not lead to an inference that the statement is false or consists of unprotected facts.

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<sup>55</sup> *Id.* at 888-889 (according to the author, the sauces could be described as "hideous" and "glop," the Oysters Bienville were a "ghastly concoction" of "strange," and "weird" flavors, and the duck was served with "horrible multiflavored rice").

<sup>56</sup> *Mashburn*, 355 So.2d at 889.

<sup>57</sup> *Id.*

<sup>58</sup> 4 Ohio App.3d at 235.

<sup>59</sup> *Id.* at 238.

<sup>60</sup> *Id.* at 238-39.

Likewise, the court in *Havalunch v. Mazza*,<sup>61</sup> concluded that the total tone of the story was one of humor and overstatement which would be obvious to any reasonable reader. Here, a restaurant sued a student newswriter for libel, concerning a tongue-in-cheek, humorous review. In the article more than twenty establishments were reviewed, including the following statement about Havalunch: “Bring a can of Raid if you plan to eat here. And paint your neck red; looks like a truck stop. You’ll regret everything you eat here, especially the BLT’s.”<sup>62</sup> The entire story was found to be an assertion of opinion and opinions do not suddenly become defamatory because they are expressed with either humor or a touch of style. “Reasonable latitude in humor and style is accorded newspaper reporters in writing reviews of restaurants.”<sup>63</sup>

In addition to reading the review as a whole and in the proper context, when a review contains statements that are loose, figurative or in a hyperbolic sense, the review will likely be characterized as an opinion.<sup>64</sup> A statement is not defamatory if it is an exaggeration or generalization that could be interpreted by a reasonable person as “mere rhetorical hyperbole.”<sup>65</sup> “Non-actionable statements do not become actionable merely because they are expressed in the form of rhetorical hyperbole.”<sup>66</sup> Many reviews are known for “pointed commentary” and being interesting and fun to read and one would expect the writer to attempt to use metaphors, exaggerations and hyperbole.<sup>67</sup> When a reviewer uses hyperbole to describe the quality of the restaurant’s food, the statements are not facts which can be taken literally. The tenor and context of a reviewer’s remarks will clearly indicate to a reasonable reader that they are examples of

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<sup>61</sup> 294 S.E.2d 70 (W. Va. 1981).

<sup>62</sup> *Id.* at 270.

<sup>63</sup> *Id.* at 274 (citing *Mashburn*, 355 So.2d 879).

<sup>64</sup> *Mr. Chow of New York*, 759 F.2d at 229 (holding that the statement “the pancakes were the thickness of a finger,” was used in a hyperbole sense to mean that the pancakes were too thick).

<sup>65</sup> *Pegasus*, 57 P.3d at 88 (finding the statement “all of this came out of some sort of package,” is not actionable because it conveyed the reviewer’s opinion that the food was pre-packed).

<sup>66</sup> *Mr. Chow of New York*, 759 F.2d at 228.

<sup>67</sup> *See id.* The review was published in a restaurant guide called Gault/Millau Guide to New York, which is known for its “pointed commentary.”

hyperbole, which are merely the expressions of the reviewer's subjective opinion.<sup>68</sup> The *Mashburn* Court pointed out that an ordinary reasonable person would not infer or take in a literal sense the actual meaning of the statements.<sup>69</sup> A piece of criticism must be read in its entirety to determine how ordinary readers would understand them and when they are regarded as mere expressions of the writer's opinion, and not statements of fact, they are not actionable in a restaurant defamation case. "To deny the press the right to use hyperbole ... would condemn the press to an arid, desiccated recital of bare facts."<sup>70</sup>

Furthermore, the *Mr. Chow of New York*<sup>71</sup> Court used a similar test established in *Ollman*, as guidance, to establish if a statement is protected opinion or unprotected fact. First, both the context in which the statement was made and the circumstances surrounding the statement must be examined.<sup>72</sup> Next, the language itself must be looked at to determine if it is used in a precise, literal manner, or whether it was used in a loose, figurative, or hyperbole sense, and lastly the statements must be scrutinized to determine if they are objectively capable of being proven true or false.<sup>73</sup> The court noted that because reviews are normally conveyors of opinions and the average reader would understand the author's statements to be an attempt to express his opinions, they are no more than the reviewer's subjective beliefs.<sup>74</sup>

In *Mr. Chow of New York*, the critique was written in a restaurant guide called *Gault/Millau to New York*, which is known for its "pointed commentary."<sup>75</sup> The reviewer said the sweet and sour pork contained "more dough than meat", and the green peppers were "still

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<sup>68</sup> *Mashburn*, 355 So.2d at 889.

<sup>69</sup> *Id.*; see also, *Greer*, 448 Ohio App.3d at 239 (finding that the statement describing the restaurant as having "a geographical schizophrenia" is another way of saying that its décor does not coincide with its menu).

<sup>70</sup> *Mr. Chow of New York*, 759 F.2d at 228 (citing *Time, Inc. v. Johnston*, 448 F.2d 378, 384 (4th Cir. 1971)).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 226.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 228.

<sup>75</sup> *Mr. Chow of New York*, 759 F.2d at 229.

frozen” on the plate.<sup>76</sup> These statements are clearly an attempt to interject style into the review and are used as hyperbole, meaning the pork was too doughy and the peppers were too cold. The court reasoned, using the established test, that the average reader would understand the statements to be opinion and therefore they are entitled to constitutional protection.

Moreover, the listing of incorrect ingredients of a reviewed restaurant dish by a newspaper’s food critic may be actionable as a false statement of fact, if it is made with actual malice.<sup>77</sup> In *Terrillo v. New York Newsday*, a dining column was published, which incorrectly listed the ingredients of the cassoulet at Le Café, a Manhattan restaurant.<sup>78</sup> After the restaurant notified Newsday of its mistake, Newsday printed an addendum to the dining column. Knowing that the listed ingredients were not accurate, the court noted that “a responsible party with due consideration for the standards of information gathering and dissemination would have issued a clear correction, if not a retraction.”<sup>79</sup> The addendum issued by Newsday was not enough.

When the review is not that of an individual diner, but rather it is an edited summary of multiple anonymous consumer opinions, the question becomes whether the use of a survey and of anonymous consumer opinions alters the traditional legal analysis.<sup>80</sup> In *Themed Restaurants, Inc. v. Zagat Survey LLC*, the court held that such distinctive factors do not require departure from the legal standards normally governing defamation.<sup>81</sup> Zagat Survey reviews restaurants “based on public opinion surveys, with numerical rating reflecting the average scores given by all survey participants who voted on each establishment and text based on direct quotes from, or

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<sup>76</sup> *Id.*

<sup>77</sup> *Terrillo*, 519 N.Y.S.2d at 914.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 916-17.

<sup>80</sup> *Themed Restaurants, Inc. v. Zagat Survey LLC*, 781 N.Y.S.2d 441, 446 (2004).

<sup>81</sup> *Id.*; *see also*, *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969) (finding that the technique used was not a valid method to conduct the poll and therefore actual malice was proven by publication of inaccurate data); *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991) (holding that the use of quotation marks indicate to the reader that the passage reproduces the speaker’s words verbatim).

fair paraphrasing of, participants' comments.”<sup>82</sup> Such use of multiple sources for collected information serves as its own protection against defamation claims and accordingly, the use of a survey does not require the development of a different legal analysis.<sup>83</sup>

Furthermore, in *Themed Restaurants*, the text of the review of the restaurant, Lucky Cheng's, was held to be protected opinion and not defamatory factual statements. The objected to statements included, “God knows you don't go for the food” and “weary well-wishers suggest they ‘freshen up the menu and their makeup.’”<sup>84</sup> These statements were held to express a viewpoint of the reviewer and are therefore subjective in nature. The inquiry must be conducted from the perspective of an ordinary reader of the statement and a reasonable reader would conclude these to be statements of opinion.

However, comments in a restaurant review are not automatically protected opinion. The comments must be viewed in the context of the review as a whole and not as individual statements. When a reasonable reader, reading a review of a restaurant, would recognize that the comments therein are the opinions of the writer and not the blanket statements of fact, the comments are not actionable.<sup>85</sup>

## **B. Actual Malice**

Due to the fact that restaurants hold themselves out to the public and are an enterprise of public interest, they are considered to be public figures, at least for the limited purpose of consumer reporting on the quality or condition of the restaurant's goods and services.<sup>86</sup> Restaurants voluntarily enter the public spectrum by providing public accommodation, actively

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<sup>82</sup> *Themed Restaurants*, 781 N.Y.S.2d at 444.

<sup>83</sup> *Id.* at 446 (quoting *New York Times Co. v. Sullivan*, 367 U.S. 254, 280 (1964)).

<sup>84</sup> *Id.* at 444.

<sup>85</sup> *Pegasus*, 57 P.3d at 93-94.

<sup>86</sup> *Id.* at 92.

advertise and by seeking commercial patronage. The review of a restaurant is of interest to the public who may patronize it sometime in the future.<sup>87</sup> Restaurant owners, operating a place of public accommodation, have injected themselves into the public arena for purposes of a food review.<sup>88</sup> Therefore, because restaurants are considered limited purpose public figures they must prove actual malice to make a reviewer's statements actionable.<sup>89</sup>

Actual malice is proven when a statement is published with knowledge that it was false or with reckless disregard for whether it was true or false.<sup>90</sup> "Reckless disregard of the truth may be found when the defendant entertained serious doubts as to the truth of the statement, but published it anyway."<sup>91</sup> Due to the difficulty in proving actual malice, restaurants face an additional burden in succeeding in a defamation lawsuit.

There are times when a reviewer may have made a mistake, either by describing the wrong restaurant or confusing two different restaurants. In *Kuan Sing Enterprise v. T.W. Wang*,<sup>92</sup> a review was written about a Chinese restaurant that was both critical of the cuisine and the service, but the reviewer had mistaken the restaurant with another restaurant in the same neighborhood. Even though a lengthy correction was subsequently published, the restaurant sued for libel. The court held that the mistake was an honest one and not prompted by malice or gross irresponsibility.<sup>93</sup> Additionally, the publication was held to be protected opinion because opinions are mere expressions of the writer's subjective beliefs.

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<sup>87</sup> *Twenty-Five East 40th Street*, 322 N.Y.S.2d at 546.

<sup>88</sup> *Pegasus*, 57 P.2d at 85.

<sup>89</sup> *Id.*

<sup>90</sup> *See New York Times*, 376 U.S. at 279-80.

<sup>91</sup> *Pegasus*, 57 P.2d at 92. (quoting *Posadas v. City of Reno*, 109 Nev. 448, 454 (1993)).

<sup>92</sup> 86 A.D.2d 549 (1982).

<sup>93</sup> *Id.* at 550.



Furthermore, mere refusal to print a correction does not necessarily prove malice. In *Pegasus v. Reno Newspapers, Inc.*,<sup>94</sup> a critical review was published regarding the freshness of Salsa Dave’s food. The critique said, “I scooped out guacamole with my fork and dug in. One taste told me what I had feared: this pale green stuff was definitely not the real deal.”<sup>95</sup> The restaurant wrote a letter to the newspaper in response to the review, requesting a retraction and publication of their letter.<sup>96</sup> After careful consideration, the newspaper refused to print a correction, but did print the restaurant’s letter to the editor. The court concluded that because the restaurant was a public figure for the limited purpose of a food review, it had to show that the reviewer acted with actual malice,<sup>97</sup> which it did not succeed in doing. The only evidence presented suggested a lack of concern on the part of the newspaper over the effect the review might have had on Salsa Dave’s. There was no indication that the newspaper published the review with knowledge that it was false or that it entertained serious doubts about the veracity of the statements contained in the review.<sup>98</sup>

Although restaurants have an extremely difficult time succeeding in a restaurant defamation case, there are circumstances when a restaurant review is actionable. When an assertion is capable of being proven true or false it may be actionable upon a showing of malice and “when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the reader,” the restaurant may succeed in establishing liability.<sup>99</sup> Additionally, when a review contains false statements,

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<sup>94</sup> *Pegasus*, 57 P.2d at 84.

<sup>95</sup> *Id.* at 85.

<sup>96</sup> *Id.* Included in the letter, they enclosed copies of invoices demonstrating that they purchased dry rather than canned pinto beans. Additionally, the letter sought a conspicuous, appropriate correction in a timely manner.

<sup>97</sup> *Id.* at 87.

<sup>98</sup> *Id.* at 93.

<sup>99</sup> *Mr. Chow of New York*, 759 F.2d at 225 (quoting *Hotchner v. Castillo-Puche*, 551 F.2d 910, 912 (1977) (“If an author represents that he has private, first-hand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact”).

such as the listing of incorrect ingredients or the physical conditions of a restaurant, the false statements may be actionable upon proof of damages.

When the reviewer goes beyond commenting on the food, décor, and service of a restaurant and prints factual statements, such statements are taken out of the realm of protected opinion.<sup>100</sup> A statement listing ingredients is not a metaphor or a hyperbole and such a statement is capable of being proven true or false. Therefore, such statements will not be constitutionally protected as statements of opinion.<sup>101</sup>

The Constitutional right to be wrong must be offset by the responsibility to correct factual errors. Integrity is not only standing up for one's rights of free expression, but also owning up to one's wrongs. This is especially true for food critics, whose words, ingested by a gullible public, can mean life or death to a restaurant.<sup>102</sup>

Similarly, where a review contains false statements of objective fact regarding the ingredients of a dish or statements concerning the physical condition of a restaurant, the false statements can be actionable.<sup>103</sup> In *Mr. Chow of New York*, the statement that Mr. Chow served Peking Duck in one dish rather than the traditional three can be considered factual because it is capable of being proven true or false.<sup>104</sup> Although such a statement is actionable, actual malice must be proven in order to recover on such a claim. Mr. Chow of New York offered no evidence that supports an inference that the reviewer knew or suspected that he was in error. Even though the statement was false and defamatory, it was not made with actual malice and therefore was not actionable.<sup>105</sup>

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<sup>100</sup> *Id.* at 916.

<sup>101</sup> *Terillo*, 519 N.Y.S.2d at 916 (holding that Newsday did in fact act in a grossly irresponsible manner and therefore a correction should have been issued).

<sup>102</sup> *Id.* at 917.

<sup>103</sup> *See, e.g., Mr. Chow of New York*, 759 F.2d at 223.

<sup>104</sup> *Id.* at 226-27.

<sup>105</sup> *Id.* at 230-31.

#### IV. EVALUATION

Because restaurants actively engage in advertising and seek commercial patronage, they are considered to be a matter of public interest. They are constantly being reviewed by past customers and critiqued by reviewers. They are written about in newspapers and magazines around the world of which are read by millions. A food critics' words and comments can mean life or death to a restaurant. With all of this in hand, should there be greater protection regarding restaurant reviews? Should reviewers be held to a higher standard?

Food critics are considered to be specialists and their opinions carry a lot of weight. The right to express your opinion must be considered in connection with the damage that may result from a critical review. Often critic's statements may be facts disguised as opinions, which have a high potential to damage a restaurant's reputation and business. Their words can make a restaurant highly popular and successful, but at the same time, their words can destroy a restaurant's reputation and force customers to eat elsewhere. Restaurant reviews are highly persuasive because their audiences are highly susceptible to the critic's comments and the credibility of the medium is usually high, making restaurant reviews extremely influential.<sup>106</sup> Due to the high possibility of damage that may result from a negative restaurant review or critique, perhaps all statements in restaurant reviews should be treated as facts. Perhaps a fault standard lower than actual malice should be used when the plaintiff is a celebrity chef. Arguably greater protection is needed.

Nevertheless, authors who utter false facts are protected under *New York Times* unless the statement is knowingly or recklessly false.<sup>107</sup> Statements of opinion have long been protected to accommodate the right to express your beliefs and ideas. The focus is on the utility of protecting

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<sup>106</sup> Jeffrey E. Thomas, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 Cal. L. Rev. 1001, 1042 (1986).

<sup>107</sup> *New York Times*, 376 U.S. at 279-80.

the statements to promote public debate. The famous quote from *Gertz*, “there is no such thing as a false idea,”<sup>108</sup> is a strong principle and should likely be upheld. Opinions are merely the subjective expressions of the person writing them. The average reader approaches a review with the knowledge that it contains only one person’s view of the restaurant. People have different tastes, experiences, and prefer different things. “Reviews, although they may be unkind, are not normally a breeding ground for successful libel actions.”<sup>109</sup>

## V. CONCLUSION

Restaurant reviews are considered to be the well known home of opinion and comment. This is so because a restaurant reviewer tries to depict and describe the writer’s experience and familiarity with the restaurant being critiqued. The reviewer is commenting on his subjective beliefs and is expressing his personal opinion. Restaurants do not seem to be gaining any ground in the area of defamation lawsuits, because courts are very reluctant to describe restaurant reviews as anything other than opinions due to their subjective nature.

As discussed, there are two main problems restaurants are facing in defamation suits. The first issue arises because restaurant reviews are considered to be opinions that cannot be proven true or false. If you cannot prove a statement to be true or false, it is considered an opinion and therefore it is not actionable. The second issue deals with the actual malice standard established in *New York Times*.<sup>110</sup> Because restaurants are an enterprise open to the public and of public interest, they are generally considered to be public figures for the limited purpose of

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<sup>108</sup> *Gertz*, 418 U.S. at 339-40.

<sup>109</sup> *Mr. Chow of New York*, 759 F.2d at 228.

<sup>110</sup> *New York Times*, 376 U.S. at 279-80.

consumer reporting and therefore must prove actual malice – either a knowing falsehood or acting with reckless disregard of the truth or falsity of the statement.<sup>111</sup>

In determining whether a statement is an opinion or fact, the statement must be read through the eyes of an ordinary reader and looked at from the context and circumstances surrounding the statement. A review is naturally perceived to be the opinion of the writer and if a reasonable reader would believe it to be the opinion of one person, it therefore must be judged accordingly as an opinion.

Restaurant reviews are becoming more and more popular and therefore are even more critical to the success of a restaurant. A restaurant review can mean life or death to a restaurant. A negative review can force a restaurant to close down whereas a positive review can mean an increase in business. Whether positive or negative, reviews can have an extreme effect on the reputation of a restaurant. At the same time, the freedom given to speech is a fundamental principle of our Constitution and must be upheld even in the context of restaurant reviews. The public has a right to know about the opinions of others and reviewers have the right to express their opinions. As long as the First Amendment's freedom of speech principle is upheld, the right to express your subjective opinions in a restaurant review will not be held actionable in a restaurant defamation suit. "Perhaps nothing is more quintessentially subjective as one's tastes in food and drink."<sup>112</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> RODNEY A. SMOLLA, LAW OF DEFAMATION § 6:88 (2d ed. 2004).