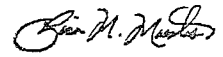


IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 28,896

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

MAR 30 2009



WALTER F. SMITH, III,

Plaintiff-Appellant,

vs.

Bernalillo County  
CV-2006-03288

WILL DURDEN, DENISE DURDEN,  
WILLIAM A. DeVRIES, and MARION  
DeVRIES,

Defendants-Appellees.

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT,  
THE HONORABLE NAN G. NASH

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**APPELLEES' ANSWER BRIEF**

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 12-213(F) NMRA, I hereby certify that the foregoing Answer Brief complies with the applicable type-volume limitation in that the body of the Answer Brief contains 3,413 words as indicated by the word-count total of the word processing system used to prepare the same, which is Microsoft Office Word 2003.

## **ANSWER BRIEF**

The Defendants-Appellees, Will Durden, Denise Durden, William A DeVries, and Marion DeVries, respectfully request this Court affirm the summary judgment granted in their favor by the District Court. The District Court's Order granting the Motion for Summary Judgment is legally correct based on the absence of any genuine issue of material fact on Plaintiff's defamation claim and entitlement to judgment as a matter of law. Plaintiff failed to come forward with any evidence on an essential element of his claim as required by Rule 1-056 NMRA. Therefore, the District Court's Summary Judgment should be affirmed.

## **SUMMARY OF PROCEEDINGS**

### **I. NATURE OF THE CASE**

This is an appeal from a summary judgment granted by the District Court in a defamation case based on the absence of evidence of actual injury or harm as a result of republication by Defendants of an anonymous defamatory letter.

## II. STATEMENT OF PROCEEDINGS

Plaintiff, Walter Smith, III, brought this defamation action against Defendants Will Durden, Denise, Durden, William A. DeVries, and Marion Devries on April 27, 2006. (R.P. 1). Following completion of written discovery and a number of depositions, Defendants filed a Motion for Summary Judgment on September 4, 2007. (R.P. 155). Plaintiff Smith responded to the Motion on September 26, 2007. (R.P. 196). Defendants' Reply was filed on October 15, 2007. (R.P. 250).

After a number of additional depositions were taken, the Court held a hearing on the summary judgment motion on June 30, 2008. Following that hearing, the Court sent a letter ruling to the parties, granting the Motion for Summary Judgment on the grounds that there was no evidence of actual injury. (R.P. 351-352). The Court's Order granting summary judgment was entered on July 15, 2008. (R.P. 360).

On July 9, 2008, after the letter ruling but before entry of the Order, Plaintiff filed a Motion to Reconsider. (R.P. 353). Defendants responded to the Motion to Reconsider on July 21, 2008. (R.P. 362). The Court then denied the Motion for reconsideration on July 30, 2008. (R.P. 385). The Notice of Appeal was timely filed on August 6, 2008). (R.P. 386).

### III. SUMMARY OF THE FACTS

This case arises out of a dispute between five members of the Vestry of St. Francis Episcopal Church, Rio Rancho, and Plaintiff-Appellant, Walter Frederick Smith, III (“Smith”), a Priest at St. Francis at the time of the underlying events. In the Episcopal Church, the Vestry is charged with direction and administration of the temporal affairs of the parish. The Vestry establishes parish policies, keeps the church in proper condition for its uses, cares for all buildings and grounds belonging to the parish, and has the responsibility to administer all fiscal affairs of the parish. Vestry members are elected by the members of the parish church and serve without compensation.

In 2004, the Vestry of St. Francis became concerned with financial issues involving Smith. The dispute came to the point that the five Vestry members petitioned the Episcopal Bishop of the Diocese of the Rio Grande on October 16, 2004, to dissolve the pastoral relationship between Smith and St. Francis. (R.P. 155-156). As a result of the ongoing dispute, Smith and the Vestry were given the opportunity to speak with and present information to the Standing Committee of the Diocese of the Rio Grande in December 2004. (R.P. 156).



Defendant-Appellee, William Conrad Durden, Jr. (“Durden”) compiled a packet (“the packet”) for the Standing Committee that provided a time line of the events relevant to the ongoing dispute. The packet included three sections and supporting documents on financial problems, lack of leadership, and personal attacks. (R.P. 156).

In early 2004, an anonymous letter dated April 8, 2004 had been sent accusing Smith of having impregnated a teenage member of the parish and making veiled implications of having had sexual relations with a young boy (“the letter”). (R.P. 209). Smith, at the recommendation of the Bishop, disclosed the existence and much of the contents of the letter to the congregation from the pulpit at services on Easter Sunday 2004. (R.P. 156, 208).

One of the points made in the packet given to the Standing Committee was that Durden felt that he, Durden, had been accused at all of the services on Easter Sunday 2004, of having had something to do with the writing of a letter dated April 8, 2004. (R.P. 156). After the announcement made at the services on Easter Sunday, Smith was aware that Durden believed that he, Durden, was being accused of having something to do with the letter, and Smith did not make any announcement to the Congregation clarifying or

explaining that he was not accusing the five Vestry members, including Durden, of having authored the April 8, 2004 letter. (R.P. 156).

There were a number of exhibits attached to the packet which were not being attached for the truth of the exhibits, but to show how a financial issue had gotten to the point where the five Vestry members were asking that Smith be removed as their Priest. One of the exhibits was a letter from Smith's daughter dated October 18, 2004 which stated:

I am writing to you because you lied to me. I am disappointed and disgusted. Your email led me to believe that you wanted to put the tension and ill feelings behind us and "move forward as fellow parishoners [sic] of St. Francis."

I have struggled to forgive you Will. It was one of the hardest things I have ever tried to do, and now I know why it was hard. Because you never meant your apology in the first place. You are a repellant man, a poor example of Christianity, and an [sic] pathetic excuse for a vestryman.

You were the only one I didn't think was a total loser. I am so disappointed in you.

Jessica McGowan

P.S. I have an idea. Next time before you envoke [sic] a Canon, you should maybe actually read it.

(R.P. 157).

Some Parishioners of St. Francis were asking Durden what was going on between the Vestry and Smith. (R.P. 157). Therefore, in January 2005,

Will Durden did a letter to members of St. Francis explaining that if people wanted to know what the issues between Father Smith and the five Vestry members were they could pick up a copy of the packet he presented to the Standing Committee. The letter to the members also advised them that, if they wanted a copy of the packet Smith presented to the Standing Committee, they could get a copy of that packet from Smith. (R.P. 157-158).

A few copies of the Vestry's packet were obtained by members of St. Francis around January 23, 2005. Smith never heard from anyone, directly or indirectly, that any person believed he had done what was described in his announcement. (R.P. 158). Nobody discussed the allegations in the letter with Smith after Durden made the packet available to the limited number of parishioners who received a copy of the packet. (R.P. 158). Nobody discussed the packet with members of Smith's family. (R.P. 158).

Durden did not believe the allegations in the letter and did not speak with or hear of anyone who believed the allegations. (R.P. 158). Durden's concern with regard to the April 8, 2004 letter was that he was being accused of having something to do with the letter. (R.P. 158). Durden did not believe the allegations in the letter and did not speak with or hear of anyone who believed the allegations. (R.P. 158).

Smith has never been interviewed regarding the letter. (R.P. 158).

Smith's family has never been interviewed regarding the letter. (R.P. 159).

Law enforcement never interviewed Smith regarding the letter. (R.P. 159).

Smith was never suspended because of the letter. (R.P. 159). Smith was denied a license at another church, St. Mary's; however, he does not know the reason the license was denied. (R.P. 159). Smith cannot identify any evidence to suggest that his license at St. Mary's was denied because of the letter or the packet. (R.P. 159).

Smith's wife is aware of no ramifications from the letter. (R.P. 159).

Nobody ever told Smith that they believed the letter and nobody used the letter to deny Smith employment. (R.P. 159).

## ARGUMENT

This case involves a claim for defamation. In a defamation case, Plaintiff has the burden of proving actual injury or harm as an essential element of the defamation cause of action. The District Court properly granted summary judgment in this case. Plaintiff failed to meet his burden by failing to come forward with any evidence establishing actual injury as a result of Defendants' republication of the anonymous letter, either in opposition to the summary judgment motion or in his request for reconsideration. This Court should affirm the District Court's grant of summary judgment.

### I. Standard of Review

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. If the facts are undisputed and only a legal interpretation of the facts remains, summary judgment is the appropriate remedy. *Bd. of County Comm'rs v. Risk Mgmt. Div.*, 120 N.M. 178, 179, 899 P.2d 1132, 1133 (1995). This Court applies a de novo standard of review to the granting of

summary judgment. *Headley v. Morgan Management Corp.*, 2005-NMCA-45, 137 N.M. 339, 110 P.3d 1076, 1078.

## **II. Summary Judgment was Properly Granted Because There is No Evidence of Actual Injury**

To successfully establish a claim for defamation, a plaintiff must prove the existence of the essential elements of the defamation cause of action. Under the framework of the Uniform Jury Instructions, the tort of defamation has nine essential elements:

- The defendant published the communication; and
- The communication contains a statement of fact; and
- The communication was concerning the plaintiff; and
- The statement of fact was false; and
- The communication was defamatory; and
- The person receiving the communication understood it to be defamatory; and
- The defendant either knew the communication was false, or negligently failed to recognize that it was false, or acted with malice; and
- The communication caused actual injury to plaintiff's reputation; and
- 
- The defendant abused its privilege to publish the communication.
- 

*Fikes v. Furst*, 2003-NMSC-033, ¶ 12, 134 N.M. 602, 81 P.3d 545;

UJI 13-1002 NMRA.

The District Court's ruling was directed to the eighth element, which requires a plaintiff to prove that an *actual injury* was caused by a defamatory statement. "[I]n defamation actions, the law restricts compensation to *actual* . . . damages." *Poorbaugh v. Mullen*, 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct.App.1982) (emphasis added); *see also*, UJI 13-1002(B)(8) NMRA (A claim of defamation requires a causal connection between the communication and an *actual* injury to plaintiff's reputation).

To establish a cause of action for defamation, a plaintiff must prove all of the elements required by Rule 13-1002, which includes that he or she suffered actual injury to his or her reputation. *See, Cowan v. Powell*, 115 N.M. 603, 605, 856 P.2d 251 (Ct. App. 1993). Regardless of what was stated in the letter, Smith must establish that the distribution of the letter by the Vestry caused actual injury to his reputation. *See Fikes v. Furst*, 2003-NMSC-033, ¶ 12, 134 N.M. 602, 81 P.3d 545.

In *Fikes v. Furst*, the New Mexico Supreme Court in an opinion authored by Justice Minzner held:

"The primary basis of an action for libel or defamation is contained in the damage that results from the destruction of or harm to that most personal and prized acquisition, one's reputation." *Gruschus v. Curtis Publishing Co.*, 342 F.2d 775, 776 (10th Cir.1965). Thus, no matter how opprobrious a defendant's statement may be, a plaintiff is not entitled to recover damages unless he or she can show that it caused an injury to reputation. Under the

framework of our Uniform Jury Instructions, the tort of defamation has nine elements. *See* UJI 13-1002(B) NMRA 2003. Two of the elements that the plaintiff must prove are that the communication at issue is defamatory, and the recipient of the communication understands it to be defamatory. *Id.* These elements raise a common question: What does it mean for a statement to be defamatory? “Generally, a statement is considered defamatory if it has a tendency to render the party about whom it is published contemptible or ridiculous in public estimation, or expose him [or her] to public hatred or contempt, or hinder virtuous [people] from associating with him [or her].”

2003-NMSC-033, ¶ 12, 134 N.M. 602, 81 P.3d 545. *See, also,*

*Bookout v. Griffin*, 97 N.M. 336, 339, 639 P.2d 1190, 1193 (1982).

Thus, while damages in a defamation action are not solely limited to financial or monetary injury, the alleged injuries must have actually occurred. *Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982); *Poorbaugh v. Mullen*, 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App. 1982); UJI 13-1002(B)(8) NMRA.

Plaintiff’s response to Defendants’ motion for summary judgment is void of any evidentiary support for Plaintiff’s alleged actual injuries. Thus, Plaintiff cannot satisfy the eighth element of a defamation claim. Once a movant establishes a prima facie case for summary judgment, the burden then shifts to the opponent of the motion for summary judgment to show that a reasonable doubt as to the existence of a genuine issue of fact. *Fikes*,



2003-NMSC-033, ¶ 11. An opponent's burden to show reasonable doubt requires the opponent to provide evidence supporting the challenged element of the claim. *Bassett v. Sheehan*, 2008-NMCA-072, ¶ 18, 144 N.M. 178, 184 P.3d 1072. The party opposing summary judgment may not rest on his allegations, but must, instead, come forward with actual evidence demonstrating the existence of a genuine issue for trial. Rule 1-056(E) NMRA.

Here, Defendants established a prima facie case of entitlement to summary judgment on the element of actual injury, and the burden shifted to Plaintiff to provide evidence of an actual injury to support his defamation claim. *Id.* However, Plaintiff failed to meet this burden. Plaintiff's response provided no evidence to support his claim of actual injury.

Instead, Plaintiff's response rested on the allegations of injury and focused on the fact that defamation damages can include non-fiscal or non-monetary damages. Plaintiff provided no affidavits, testimony, or other actual evidence establishing that he suffered an *actual* injury, either in response to the summary judgment motion or in his Motion to Reconsider. Consequently, Plaintiff failed to meet his burden. Thus, the District Court properly concluded that there are no genuine issues of material fact and Defendants are entitled to summary judgment as a matter of law.

In the Brief in Chief, Smith argues that in making the summary judgment motion, Defendants had the burden to refute Plaintiff's allegations of actual harm. (Brief in Chief at pp. 4-5). However, the moving party need not affirmatively negate the nonmovant's claim in order to obtain summary judgment. *Livingston v. Begay*, 98 N.M. 712, 717, 652 P.2d 734 (1982); *Allen v. Muskogee, Oklahoma*, 119 F.3d 837, 840 (10<sup>th</sup> Cir. 1997), *cert. denied*, 118 S.Ct. 1165, 140 L.Ed.2d 176 (1998), *citing Celotex v. Catrett*, 477 U.S. 317, 322-23, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Instead, once a *prima facie* showing has been made, the burden is on the non-moving party to demonstrate the existence of genuine issues of material fact. Rule 1-056(C) NMRA.

In his Brief in Chief, Smith also claims the District Court's grant of summary judgment should be reversed because he will present evidence *at trial* that he suffered some actual injury. (Brief in Chief at p. 2). Smith, however, did not raise any such evidence at the trial court level in response to the summary judgment motion and cites to no such evidence in the record to support this claim. Under Rule 1-056, when faced with a motion for summary judgment, a party may not rest on allegations, but must come forward with actual evidence demonstrating the existence of genuine issues of material fact. Rule 1-056(E) NMRA.

Evidence of injury to Smith is evidence that would be in the knowledge of Smith from the outset of this litigation. Even in the Brief in Chief, however, Smith continues to rest on the allegations of his Complaint, rather than identifying any actual evidence in the record to support his claims. (Brief in Chief at p. 9). Having failed to come forward with any evidence in the trial court, summary judgment was properly granted and should be affirmed by this Court. *DiMarco v. Presbyterian Healthcare Services, Inc.*, 2007-NMCA-053, ¶ 18, 141 N.M. 735, 160 P.2d 916.

### **III. The Fact that No One Believed the Letter Supports the Absence of Any Actual Injury**

Smith also argues that despite evidence that no one believed the contents of the anonymous letter, summary judgment should be reversed because a recipient of the communication could have understood it to have defamatory meaning. Although the law of other jurisdictions requires evidence that someone believed the alleged defamatory statement, New Mexico law does not appear to require that there be evidence of belief. Instead, under New Mexico law, the issue in connection with the sixth element of defamation is not whether a recipient of the statement believed it, but, rather, whether the recipient could have understood the words to have defamatory meaning. See, *Fikes v. Furst*, 2003-NMSC-033, ¶ 16, 134 N.M. 602, 607, 81 P.3d 545, 550. See, also, UJI 13-1002(B)(6).

The issue raised by Defendants' Motion, however, was not about the sixth element of defamation: whether the statement was true versus whether a recipient could have understood the letter to have defamatory meaning. There is no dispute that the letter could be understood to have defamatory meaning. Instead, the issue on Defendants' summary judgment motion is on the eighth element--the absence of actual injury. Regardless of whether a recipient understood the letter to have defamatory meaning, Smith must still show that he suffered actual harm as a result of republication of the letter by the Vestry. And the fact that no one actually believed the statement in this case is strong evidence in support of the absence of any actual injury.

Belief or non-belief of a defamatory statement is evidence relevant to a consideration of actual damage, as other courts have determined. "Whether a defamatory statement is believed by those who hear it is relevant to the issue of damages." *Luster v. Retail Credit Co.*, 575 F.2d 609, 615 (C.A.Ark.1978). Where a statement is not believed by the hearer, the statement can not be said to have caused actual damage to the person that the statement was about. *Tatum v. Phillip Morris Inc.*, 809 F.Supp. 1452, 1472 (W.D.Okl.1992) (Among other reasons, the court found that the plaintiff was not damaged in anyway by an alleged defamatory statement because none of

the prospective employers that read the defamatory statement *believed* the plaintiff was unfit for his business occupation.)

Like the plaintiff in *Tatum*, the Plaintiff in this case did not suffer any actual injury because people did not believe the alleged defamatory statements at issue, and therefore, did not think any less of the Plaintiff. In other words, Plaintiff is unable to demonstrate actual harm to his reputation and communal standing. Having failed to produce any evidence showing actual injury, the District Court properly granted summary judgment on Smith's claims in this case. Rule 1-056 NMRA.

### **CONCLUSION**

The District Court's Order granting Defendants' motion for summary judgment is legally correct and supported by the undisputed facts in the record. Defendants made a *prima facie* showing of the absence of any actual injury in this case. Plaintiff failed to come forward with any evidence demonstrating the existence of a genuine issue of material fact for trial, as required by Rule 1-056 NMRA. Thus, the District Court's Order granting Defendants' motion for summary judgment should be affirmed.

Respectfully submitted,

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