

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

WALTER F. SMITH,

Plaintiff-Appellant,

vs.

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

Defendants-Appellees.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
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Court of Appeals No. 28,896
Bernalillo County No. CV 2006-03288

**CIVIL APPEAL FROM THE BERNALILLO COUNTY DISTRICT COURT
HONORABLE NAN G. NASH**

Appellant's Reply Brief

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REPLY TO SUMMARY OF PROCEEDINGS

Defendants wish, on this Appeal, to refashion their Motion for Summary Judgment to include a claim that Walter Smith suffered no emotional distress or humiliation. In fact, in the district court, the Defendants' Motion for Summary Judgment very specifically contended that Walter Smith could not maintain an action because: (a) the dissemination of the defamatory material was a "republication" and therefore not actionable; and (b) the cause of action could not survive because Father Smith failed to produce a witness who would testify that he or she believed the letter.

In response to these arguments, Father Smith contended, at the district court below and in this court, that neither the republication nor the lack of a believing witness is a sufficient cause to dismiss the case on a motion for summary judgment. Rather, given the outrageous nature of the communication (a letter which falsely accused Father Smith of having sex with a young boy and making a young girl pregnant) and its dissemination by the Defendants to an unknown number of people, Father Smith was not required, as a prerequisite to continuing with this case, to produce a witness to testify that he or she believed the letter.

Defendants never negated in their motion for summary judgment Father Smith's allegation in Paragraph 3 of the Complaint Based Upon Defamation, that

he suffered stress, anxiety and humiliation. (RP 1). In the five page Statement of Undisputed Material Facts in their brief, Defendants did not ever address this allegation in the complaint that the Plaintiff suffered because of the stress, anxiety and humiliation due to publication of the defamatory letter. (RP 155-159).

REPLY TO SUMMARY OF FACTS

Defendants' Summary of the Facts includes a number of irrelevant statements such as the argument that it was acceptable for the Defendants to republish the letter because they were responding to allegations made by someone else. However, they failed to disclose that even Defendant DeVries believed the letter was defamatory.

Defendants submit that they were attacked for criticizing Father Smith (answer Brief at 4-6) and apparently the publication of the letter by the Defendants was merely to respond to these allegations. This, of course, is a question to be decided at trial as to whether the Defendants use of the letter was appropriate.

ARGUMENT

1. ***Defendants' Attempts To Refashion Their Arguments Underlying The Motion For Summary Judgment Should Fail.***

Defendants in the district court argued that they were entitled to summary judgment because Father Smith could not produce a witness who believed the defamatory letter. (RP 162). Instead of re-stating that argument in their Answer Brief, the Defendants now wish to change the nature of their motion by arguing that once they filed a motion for summary judgment, Plaintiff was under an obligation to present evidence of emotional distress or humiliation. This is simply unfair and was not the subject of Defendants' Motion.

In the Court below, Defendants contended that the distribution of the defamatory letter was a republication and not actionable (RP 160) and there was no actual injury to reputation because: (a) nobody said they believed the defamation; (b) Father Smith himself published some of the allegations; and (c) any injury was due to the letter and not the distribution by the defendants. (RP 162-163). And, defendant failed to assert, in any of their alleged Undisputed Facts, that plaintiff did *not* suffer any stress, anxiety and humiliation due to the distribution of the letter as alleged in the Complaint (RP 155-159) and (Para 3 of the Complaint, RP 1). The question before the court is whether the absence of a believing witness

forecloses a cause of action for defamation where: (1) the letter on its face is defamatory; (2) Plaintiff could present evidence that he suffered humiliation and emotional distress as alleged in the Complaint; and (3) the letter was disseminated to an unknown number of people.

Defendants at page 12 – 14 of their brief argue that their Motion for Summary Judgment broadly covered the fact that there were no “actual injuries”. Specifically, the Defendants allege that they “established a prima facie case of entitlement to summary judgment on the element of actual injury.” Answer Brief at 12. At that point, Defendants argue, it was incumbent upon the Plaintiff to produce affidavits regarding his own humiliation and emotional distress. But, that was not the motion.

2. *Defendants Concede That The Absence Of A Belief In The Letter Does Not Foreclose A Cause Of Action.*

With respect to the issue of belief, the Defendants appear to concede that they published the statement by handing out a packet of material which contained the defamatory letter. The Defendants, at page 14 of their Answer Brief state:

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.

Thus, the Defendants have conceded that the issue is whether the recipient could have understood the words to have defamatory meaning.

The Defendants also admit that the letter was defamatory: “There is no dispute that that the letter could be understood to have defamatory meaning.” Answer Brief at 15. Indeed, as pointed out in Plaintiff’s Brief in Chief, Defendant William DeVries, an initial recipient of the communication, admitted that the letter was calculated to damage the reputation of Father Smith and he would anticipate that a person who was the subject of the letter could suffer distress and anxiety. BIC at 7.

The Defendants reliance on *Tatum v. Phillip Morris Inc.*, 809 F.Supp. 1452 (W.D. Okla. 1992) is misplaced. The Court in *Tatum* pointed out that Oklahoma law required several elements to support defamation: First, that a recipient of the communication attributed the same defamatory imputations as the victim did to language in the communication. In this case Defendant DeVries acknowledges the same imputation to the communication as Plaintiff has in his Complaint. Second, the defamatory communication must tend to lower the Plaintiff in the estimation of men whose opinion the court can recognize. Again, the court can certainly recognize Defendant DeVries is one such man. Third, that the statement is untrue.

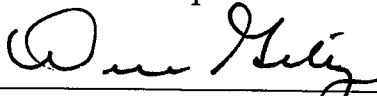
In this case, it is undisputed that the statement is untrue. Fourth, that there not be any privilege attached to the communication. Here, the Defendants have not asserted any privilege.

The *Tatum* court held that there could not be any liability for defamation because: (a) it was true that the plaintiff had stolen a bottle of wine as alleged by his supervisors; and (b) his employer was privileged to communicate the fact to other potential employers. And, the Court in *Tatum* recognized, in *dicta*, that other employer recipients of the communication concerning the wine theft either tended not to believe that it had occurred or dismissed its importance. Those facts are not present in this case. Therefore, the *Tatum* decision assists the Plaintiff, not the Defendants.

CONCLUSION

Plaintiff-Appellant respectfully submits that the District Court's decision granting Defendants-Appellees' Motion for Summary Judgment should be reversed.

Respectfully submitted,
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Certificate of Service

It is hereby certified that I caused to be mailed a true and correct copy of the foregoing pleading to the following counsel of record on this 21st day of April, 2009:



William G. Gilstrap